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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 478

R. MILO GILBERT, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 19, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 478

R. MILO GILBERT, PETITIONER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

February, 1959, Grand Jury

No. 27865-Cd

UNITED STATES OF AMERICA, Plaintiff,

v.

R. MILO GILBERT, Defendant

INDICTMENT—Filed August 5, 1959

[U.S.C., Title 26, Sec. 7206(2), Title 18, Secs. 495 and 1001—Income Tax]

The Grand Jury charges:

Count One

[U.S.C., Title 26, Sec. 7206(2)]

On or about April 15, 1955, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Louis Dunoff and Beatrice Dunoff for the calendar year 1954, in which said return it was represented that the said Louis Dunoff and Beatrice Dunoff were entitled under the provisions of the internal revenue laws to claim a deduction from adjusted gross income of $150 for church contributions, whereas, as the said defendant then and there well knew, the said Louis Dunoff and Beatrice Dunoff were not entitled to claim said deduction for said calendar year.

[fol. 26] Count Two

[U.S.C., Title 26 Sec. 7206(2)]

On or about April 16, 1956, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Louis Dunoff for the calendar year 1955, in which said return it was represented that the said Louis Dunoff was entitled under the provisions of the internal revenue laws to claim a deduction from adjusted gross income of $75 for church contributions, whereas, as the said defendant then and there well knew, the said Louis Dunoff was not entitled to claim said deduction for said calendar year.

[fol. 27] Count Three

[U.S.C., Title 26, Sec. 7206(2)]

On or about April 16, 1956, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Beatrice Dunoff for the calendar year 1955, in which said return it was represented that the said Beatrice Dunoff was entitled under the provisions of the internal revenue laws to claim a deduction from adjusted gross income of $75 for church contributions, whereas, as the said defendant then and there well knew, the said Beatrice Dunoff was not entitled to claim said deduction for said calendar year.

[fol. 28] **Count Four**

[U.S.C., Title 26, Sec. 7206(2)]

On or about April 15, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Louis Dunoff for the calendar year 1956, in which said return it was represented that the said Louis Dunoff was entitled under the provisions of the internal revenue laws to claim business deductions of $200 for promotion, $400 for rent, $42 for utilities and $150 for accounting, and to claim a deduction from adjusted gross income of $87.75 for church contributions, whereas, as said defendant then and there well knew, the said Louis Dunoff was not entitled to claim said deductions for said calendar year.

[fol. 29] **Count Five**

[U.S.C., Title 26, Sec. 7206(2)]

On or about April 15, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Beatrice Dunoff for the calendar year 1956, in which said return it was represented that the said Beatrice Dunoff was entitled under the provisions of the internal revenue laws to claim business deductions of $200 for promotion, $400 for rent, $42 for utilities and $150 for accounting, and to claim a deduction from adjusted gross income of $87.75 for church contributions, whereas, as defendant then and there well knew, the said Beatrice Dunoff was not entitled to claim said deductions for said calendar year.

[fol. 30] Count Six

[U.S.C., Title 26, Sec. 7206(2)]

On or about April 15, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Bernard Arond for the calendar year 1956, in which said return it was represented that the said Bernard Arond was entitled under the provisions of the internal revenue laws to claim a loss from an Empire Hotel partnership of $1604.20, whereas, as the said defendant then and there well knew, the said Bernard Arond was not entitled to claim said loss for said calendar year.

[fol. 31] Count Seven

[U.S.C., Title 26, Sec. 7206(2)]

On or about April 15, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Mollie Arond for *the* calendar year 1956, in which said return it was represented that the said Mollie Arond was entitled under the provisions of the internal revenue laws to claim a loss from an Empire Hotel partnership of $1,604.20, where as, as the said defendant then and there well knew, the said Mollie Arond was not entitled to claim said loss for said calendar year.

[fol. 32] Count Eight

[U.S.C., Title 26, Sec. 7206(2)]

On or about April 18, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully

and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of James J. Manion for the calendar year 1955, in which said return it was represented that the said James J. Manion was entitled under the provisions of the internal revenue laws to claim business deductions as a public relations consultant of $240 for rent, $264.60 for telephone, $2,145 for promotion and exploitation and $262.50 for traveling, whereas, as said defendant then and there well knew, the said James J. Manion was only entitled to claim business deductions as a public relations consultant for said calendar year, of $162.50 for rent, $172 for telephone, $645 for promotion and exploitation and $212.50 for traveling.

[fol. 33] Count Nine

[U.S.C., Title 26, Sec. 7206(2)]

On or about April 18, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Manon Manion for the calendar year 1955, in which said return it was represented that the said Manon Manion was entitled under the provisions of the internal revenue laws to claim business deductions as a public relations consultant of $240 for rent, $264.60 for telephone, $2,145 for promotion and exploitation and $262.50 for traveling, whereas, as said defendant then and there well knew, the said Manon Manion was only entitled to claim business deductions as a public relations consultant for said calendar year, of $162.50 for rent, $172 for telephone, $645 for promotion and exploitation and $212.50 for traveling.

[fol. 34] Count Ten

[U.S.C., Title 26, Sec. 7206(2)]

On or about April 17, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Manon Manion for the calendar year 1956, in which said return it was represented that the said Manon Manion was entitled under the provisions of the internal revenue laws to claim business deductions as a public relations consultant of $240 for rent, $89 for secretarial service, $117.87 for telephone, $1,281 for promotion and exploitation and $143.50 for interest and bank charges and to claim business deductions as a manufacturers representative of $270 for rent, $282.50 for telephone and $428 for promotion and exploitation, whereas, as said defendant then and there well knew, the said Manon Manion was only entitled to claim business deductions as a public relations consultant for said calendar year of $210 for rent, $39 for secretarial service, $67.85 for telephone, $81 for promotion and exploitation and $44 for interest and bank charges and was only entitled to claim business deductions as a manufacturers representative for said calendar year of $172 for rent, $171.50 for telelphone and $128 for promotion and exploitation.

[fol. 35] Count Eleven

[U.S.C., Title 26, Sec. 7206(2)]

On or about April 17, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of James J. Manion for the calendar year 1956, in which said return it was repre-

sented that the said James J. Manion was entitled under the provisions of the internal revenue laws to claim business deductions as a public relations consultant of $240 for rent, $89 for secretarial service, $117.87 for telephone, $1,281 for promotion and exploitation and $143.50 for interest and bank charges and to claim business deductions as a manufacturers representative of $270 for rent, $282.50 for telephone and $428 for promotion and exploitation, whereas, as said defendant then and there well knew, the said James J. Manion was only entitled to claim business deductions as a public relations consultant for said calendar year of $210 for rent, $39 for secretarial service, $67.85 for telephone, $81 for promotion and exploitation and $44 for interest and bank charges and was only entitled to claim business deductions as a manufacturers representative for said calendar year of $172 for rent, $171.50 for telephone and $128 for promotion and exploitation.

[fol. 36] Count Twelve

[U.S.C., Title 18, Sec. 495]

On or about June 6, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert knowingly and wilfully falsely made, forged and altered United States Treasury check number 10,643,497, dated June 6, 1957, in the amount of $858.95, payable to James J. Manion, in that the defendant R. Milo Gilbert endorsed the name and signature of said payee on said check, for the purpose of obtaining and receiving said amount from the United States, its officers and agents.

[fol. 37] Count Thirteen

[U.S.C., Title 18, Sec. 495]

On or about June 18, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, the defendant R. Milo Gilbert knowingly and wilfully falsely made, forged and altered United States Treasury check number 10,685,637, dated June 18, 1957, in the amount of $860.97, payable to Manon Manion, in that the defendant R. Milo Gilbert endorsed the name and sig-

nature of said payee on said check, for the purpose of obtaining and receiving said amount from the United States, its officers and agents.

[fol. 38] Count Fourteen

[U.S.C., Title 18, Sec. 495]

On or about July 5, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, the defendant R. Milo Gilbert knowingly and wilfully falsely made, forged and altered United States Treasury check number 10,707,063, dated July 5, 1957, in the amount of $377.58, payable to Manon Manion, in that the defendant R. Milo Gilbert endorsed the name and signature of said payee on said check, for the purpose of obtaining and receiving said amount from the United States, its officers and its agents.

[fol. 39] Count Fourteen

[U.S.C., Title 18, Sec. 495]

On or about July 25, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, the defendant R. Milo Gilbert knowingly and wilfully presented and caused to be presented to the Payment and Reconciliation Division, U. S. Treasury Department, Office of Treasurer, U. S., an office of the United States, a false, altered and forged United States Treasury Check No. 10,730,575, dated July 25, 1957, in the amount of $365.80, payable to James J. Manion, in relation to a claim for tax refund, with intent to defraud the United States, knowing said check to be false, altered and forged, in that the defendant R. Milo Gilbert had endorsed the name and signature of said payee on said check.

[fol. 40] Count Sixteen

[U.S.C., Title 18, Sec. 495]

On or about August 30, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, the defendant R. Milo Gilbert knowingly and wilfully presented and caused to be presented to the

Payment and Reconciliation Division, U. S. Treasury Department, Office of Treasurer U.S., an office of the United States, a false, altered and forged United States Treasury check No. 10,768,977, dated August 30, 1957, in the amount of $610.77, payable to N & T Libling, in relation to a claim for tax refund, with intent to defraud the United States, knowing said check to be false, altered and forged, in that the defendant R. Milo Gilbert had endorsed the name and signature of said payee on said check.

[fol. 41] Count Seventeen

[U.S.C., Title 18, Sec. 495]

On or about November 8, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, the defendant R. Milo Gilbert knowingly and wilfully presented and caused to be presented to the Payment and Reconciliation Division, U. S. Treasury Department, Office of Treasurer U.S., an office of the United States, a false, altered and forged United States Treasury check No. 12,054,960, dated November 8, 1957, in the amount of $398.19, payable to Dolores J. Frankel, in relation to a claim for tax refund, with intent to defraud the United States, knowing said check to be false, altered and forged, in that the defendant R. Milo Gilbert had endorsed the name and signature of said payee on said check.

[fol. 42] Count Eighteen

[U.S.C., Title 18, Sec. 1001]

On or about November 8, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, the defendant R. Milo Gilbert knowingly and wilfully stated and represented, in a matter within the jurisdiction of and material to the Payment and Reconciliation Division, U.S. Treasury Department, Office of Treasurer U.S., a department and agency of the United States, that he was duly authorized to endorse the name and signature of the payee on U.S. Treasury Check No. 12,054,961, dated November 8, 1957, in the amount of $428.50, payable to Fay Matorian, which statement and representation was false and fraudulent, as the

defendant then and there well knew, in that the defendant was not so authorized to endorse said check.

[fol. 43] Count Nineteen

[U.S.C., Title 18, Sec. 1001]

On or about November 22, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert knowingly and wilfully stated and represented in a manner within the jurisdiction of and material to the Payment and Reconciliation Division, U.S. Treasury Department, Office of Treasurer U.S., a department and agency of the United States, that he was duly authorized to endorse the name and signature of the payee on U.S. Treasury Check No. 12,057,078, dated November 22, 1957, in the amount of $429.17, payable to Sam Matorian, which statement and representation was false and fraudulent, as the defendant then and there well knew, in that the defendant was not so authorized to endorse said check.

[fol. 44] Count Twenty

[U.S.C., Title 18, Sec. 1001]

On or about November 22, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, the defendant R. Milo Gilbert knowingly and wilfully stated and represented in a matter within the jurisdiction of and material to the Payment and Reconcilation Division, U.S. Treasury Department, Office of Treasurer U.S., a department and agency of the United States, that he was duly authorized to endorse the name and signature of the payee on U.S. Treasury Check No. 12,057,072, dated November 22, 1957, in the amount of $522.58, payable to Allan S. Frankel, which statement and representation was false and fraudulent, as the defendant then and there well knew, in that the defendant was not so authorized to endorse said check.

[fol. 45] Count Twenty-one

[U.S.C., Title 18, Sec. 495]

On or about June 2, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, the defendant R. Milo Gilbert knowingly and wilfully forged on United States Treasury Check No. 11,260,576, dated June 2, 1958, in the amount of $848.11, the endorsement and signature of the payees, Daniel H. and Chalrene R. Bartfield for the purpose of obtaining and receiving said amount from the United States, its officers and agents.

[fol. 46] Count Twenty-two

[U.S.C., Title 18, Sec. 495]

On or about June 2, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, the defendant R. Milo Gilbert knowingly and wilfully forged on United States Treasury Check No. 11,260,577, dated June 2, 1958, in the amount of $556.04, the endorsement and signature of the payees, Daniel H. and Chalrene R. Bartfield, for the purpose of obtaining and receiving said amount from the United States, its officers and agents.

[fol. 47] Count Twenty-three

[U.S.C., Title 26, Sec. 7206(2)]

On or about April 15, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counse procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Juventino Silva for the calendar year 1956, in which said return it was represented that the tax withheld was $361.02, whereas as the defendant then and there well knew, the tax withheld was $36.19.

[fol. 48] Count Twenty-Four

[U.S.C., Title 26, Sec. 7206(2)]

On or about April 15, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Celia Sally Silva for the calendar year 1956, in which said return it was represented that the tax withheld was $361.02, whereas as the defendant then and there well knew, the tax withheld was $36.19.

[fol. 49] Count Twenty-Five

[U.S.C., Title 26, Sec. 7206(2)]

On or about July 22, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Juventino Silva for the calendar year 1957, in which said return it was represented that the tax withheld was $393.20, whereas as the defendant then and there well knew, the tax withheld was $18.25.

[fol. 50] Count Twenty Six

[U.S.C., Title 26, Sec. 7206(2)]

On or about July 22, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Celia Sally Silva for

the calendar year 1957, in which said return it was represented that the tax withheld was $393.20, whereas the defendant then and there well knew, the tax withheld was $18.25.

[fol. 51] Count Twenty-Seven

[U.S.C., Title 26, Sec. 7206(2)]

On or about April 15, 1959, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Juventino Silva for the calendar year 1958, in which said return it was represented that the tax withheld was $304.65, whereas as the defendant then and there well knew, the tax withheld was $4.65.

[fol. 52] Count Twenty-Eight

[U.S.C., Title 26, Sec. 7206(2)]

On or about April 15, 1959, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Celia Sally Silva for the calendar year 1958, in which said return it was represented that the tax withheld was $304.65, whereas as the defendant then and there well knew, the tax withheld was $4.65.

[fol. 53] Count Twenty-Nine

[U.S.C., Title 26, Sec. 7206(2)]

On or about April 11, 1957, in Los Angeles County, Calif., within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and know-

ingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Raul Anchondo for the calendar year 1956, in which said return it was represented that the tax withheld was $483.25, whereas as the defendant then and there well knew, the tax withheld was $178.25.

[fol. 54] Count Thirty

[U.S.C., Title 26, Sec. 7206(2)]

On or about April 11, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Angela Anchondo for the calendar year 1956, in which said return it was represented that the tax withheld was $483.25, whereas as the defendant then and there well knew, the tax withheld was $178.25.

[fol. 55] Count Thirty-One

[U.S.C., Title 26, Sec. 7206(2)]

On or about April 15, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Raul Anchondo for the calendar year 1957, in which said return it was represented that the tax withheld was $485.30, whereas as the defendant then and there well knew, the tax withheld was $185.30.

[fol. 56] Count Thirty-Two

[U.S.C., Title 26, Sec. 7206(2)]

On or about April 15, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudlent income tax return of Angela Anchondo for the calendar year 1957, in which said return it was represented that the tax withheld was $485.30, whereas the defendant then and there well knew, the tax withheld was $185.30.

[fol. 57] Count Thirty-Three

[U.S.C., Title 26, Sec. 7206(2)]

On or about May 28, 1959, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Raul Anchondo for the calendar year 1958, in which said return it was represented that the tax withheld was $487.40, whereas as the defendant then and there well know, the tax withheld was $222.40.

[fol. 58] Count Thirty-Four

[U.S.C., Title 26, Sec. 7206(2)]

On or about May 28, 1959, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Angela Anchondo for the calendar year 1958, in which said return it was represented

that the tax witheld was $487.40, whereas as the defendant then and there well knew, the tax withheld was $222.40.

[fols. 59-95] Count Thirty-Five

[U.S.C., Title 26, Sec. 7206(2)]

On or about July 17, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant R. Milo Gilbert did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection District, at Los Angeles, California, of a false and fraudulent income tax return of Alvin H. Dunagan for the calendar year 1957, in which said return it was represented that said Alvin H. Dunagan had received no taxable income for said calendar year, whereas, as the said defendant then and there well knew the said Alvin H. Dunagan had received a taxable income of $3360.18 for said calendar year.

A True Bill.

—— —— —, Foreman.

Laughlin E. Waters, United States Attorney.

[fol. 96] [File endorsement omitted]

In United States District Court for the Southern District of California, Central Division

No. 27865-CD

[Title omitted]

Order Granting Defendant's Motion for the Return of Seized Property and the Suppression of Evidence—October 23, 1959

On Monday, October 5, 1959, at 2:00 p.m., before the Honorable Leon R. Yankwich, judge presiding, the defendant's Motion for the Return of Seized Property and the Suppres-

sion of Evidence, came on regularly for hearing. The plaintiff was represented by Laughlin E. Waters, United States Attorney, and Robert D. Hornbaker, Assistant United States Attorney, and the defendant was represented by Albert A. Dorn. The Court, after receiving evidence and after argument of counsel, made the following order:

Defendant's Motion For the Return of Seized Property and the Suppression of Evidence was granted and all of the property seized from defendant was ordered returned to defendant and the said property was ordered suppressed as evidence against defendant, except in the following particulars, wherein the Motion was denied:

1. File in relation to James Manion and Manon Manion.
2. File in relation to N &T Libling.

[fols. 97-114] 3. File in relation to Dolores J. Frankel.

4. File in relation to Fay Matorian.
5. File in relation to Daniel H. and Charlene R. Bartfield.

The Court further ordered plaintiff to return to defendant in relation to items 1 through 5 hereinabove, all powers of attorneys seized by plaintiff for the reason that defendant requires said documents in order to prepare for his defense to this action.

Dated this 23rd day of October, 1959.

/s/ Leon R. Yankwich, United States District Court Judge

Approved as to form.

/s/ Robt. D. Hornbaker, Attorney for Plaintiff.

Approved as to form.

/s/ Albert A. Dorn, Attorney for Defendant.

[fols. 115-123] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

[Title omitted]

No. 27865-CD

Court's Instructions to the Jury—Filed November 24, 1959

Given: /s/ Leon R. Yankwich, U. S. District Judge.

* * * * * * *

[fol. 124] The statute under which counts one through eleven and twenty-three through thirty-five of the Indictment are brought is Section 7206(2), Internal Revenue Code of 1954, which, in pertinent part reads as follows:

> "Sec. 7026. Fraud and False Statements.
> "Any person who—
>
> "(1) * * *
>
> "(2) Aid or Assistance.—Wilfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the Internal Revenue laws, or a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document: * * *"

shall be guilty of an offense.

The statute under which counts twelve through seventeen and twenty-one and twenty-two are brought is 18 U.S.C., § 495 which provides that:

> "Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other

person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

"Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

"Whoever transmits to, or presents at any office [fols. 125-139] or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, Knowing the same to be false, altered, forged, or counterfeited—

shall be guilty of an offense.

The statute under which counts eighteen through twenty are brought is 18 U.S.C., § 1001, which states that:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry—

shall be guilty of an offense.

* * * * * * *

[fol. 140] Where a tax accountant represents a taxpayer in the preparation of tax returns, there is no presumption of authority and the rights of the tax accountant must be governed by the terms of his employment, as applies to any other ordinary agency.

Also, a power of attorney to prosecute a claim against the Government giving authority to receive a check in payment gives the agent no power to indorse and collect the check. But such authority may be given either orally or by writing.

* * * * * * *

[fols. 141-164] Definition of Word "Trustee" Given to Jury at Request of Juror No. 2—Glenn A. Davidson, and by Stipulation of Counsel:

Trustee: One entrusted with the property of another.

* * * * * * *

[fol. 165] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 27865-CD

[Title omitted]

DEFENDANT'S REQUEST FOR INSTRUCTIONS—Filed November 24, 1959

The defendant respectfully requests that the Court include the attached special instructions in its charge to the jury.

Respectfully submitted, /s/ Albert A. Dorn, Attorney for Defendant.

[fol. 166] Defendant's Requested Instruction No. 1

One who executes an instrument purporting on its face to be executed by him as agent of a principal named therein, when in fact he has no authority for such principal to execute said instrument, is not guilty of forgery.

People v. *Bendit* 111C 274 (1896); *International Finance Corporation* vs. *People's Bank of Keyser*, 27 F 2d 523 at 527. 4 I ALR 231 n.

[fol. 167] Defendant's Requested Instruction No. 2

A check endorsed as follows—name of payee by other as trustee, does not constitute a forged instrument under U.S.C. Title 18, Section 495.

[fols. 168-170] Defendant's Requested Instruction No. 3

The endorsing of a government check by the defendant, by writing the name of the payee on the check and below the payee's name the defendant's name as trustee, does not constitute an offense under U.S.C. Title 18, Section 1001.

[fol. 171] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 27865-CD

[Title omitted]

JURY VERDICT—November 25, 1959

We the Jury in the above-entitled cause find the defendant, R. Milo Gilbert, Not Guilty as charged in Count 1 of the indictment;

Not Guilty as to Count 2;
Not Guilty as to Count 3;
Guilty as to Count 4;
Guilty as to Count 5;
Guilty as to Count 6;
Guilty as to Count 7;
Guilty as to Count 8;
Guilty as to Count 9;
Guilty as to Count 10;
Guilty as to Count 11;
Guilty as to Count 12;
Guilty as to Count 13;
Guilty as to Count 14;
Guilty as to Count 15;
[fols. 172-173] Guilty as to Count 16;
Guilty as to Count 17;
Guilty as to Count 18;
Guilty as to Count 19;
Guilty as to Count 20;
Guilty as to Count 21;

Guilty as to Count 22;
Guilty as to Count 23;
Guilty as to Count 24;
Guilty as to Count 25;
Guilty as to Count 26;
Guilty as to Count 27;
Guilty as to Count 28;
Guilty as to Count 29;
Guilty as to Count 30;
Guilty as to Count 31;
Guilty as to Count 32;
Guilty as to Count 33;
Guilty as to Count 34; and
Not Guilty as to Count 35 of the Indictment.

Dated this 25th day of November, 1959, at Los Angeles, California.

Paul E. Doorsky, Jury Foreman.

[fols. 174-177] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 27865

[Title omitted]

NOTICE FOR JUDGMENT OF ACQUITTAL AND MOTION FOR NEW TRIAL—Filed December 3, 1959

The defendant, R. Milo Gilbert, hereby moves the Court that a judgment of acquittal be entered, or in the alternative, the defendant be granted a new trial. The grounds upon which this motion is made are as follows:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.
2. The verdict is contrary to the weight of the evidence.
3. The verdict is not supported by substantial evidence.
4. The Court erred in charging the jury and in refusing to charge the jury as requested.

5. The Court erred in denying defendant's motion objecting to the introduction of any evidence made at the beginning of the trial.

/s/ Albert A. Dorn, Attorney for Defendant.

[fol. 177a] In United States District Court, Southern District of California, Central Division

No. 27,865 Criminal

Minutes of the Court

Date: Jan. 22, 1960, At: Los Angeles, Calif.

[Title omitted]

Present: Hon. Leon R. Yankwich, District Judge; Deputy Clerk: C. A. Seitz; Reporter: Samuel Goldstein; U.S. Att'y, by Assistant U.S. Att'y, Robert D. Hornbaker; Counsel for Defendant, Albert A. Dorn, (retained).

Defendant, ——, —— present (on bond).

Minute Entry re Order on Hearing on Motion for New Trial, etc. and Sentence—January 22, 1960

Proceedings: For hearing (1) defendant's motion for new trial; (2) defendant's motion for judgment of acquittal notwithstanding the verdict; and (3) pre-sentence report; and

For sentencing on counts 4 through 34 of the Indictment in thirty-five counts upon verdict of guilty.

Attorney Dorn argues to the Court on behalf of defendant as to both motions.

Attorney Hornbaker argues to the Court on behalf of Gov't in opposition to said motions.

Court denies both motions.

Court Sentences defendant R. Milo Gilbert to one year and one day on each of counts 4 through 34, said sentences on said counts to run consecutively and not concurrently, and it is further adjudged that said defendant pay unto USA the total sum of $5,000, as the cost of prosecution on counts 4 through 11, and counts 23 through 34; and it is

further adjudged that the defendant shall become eligible for parole at the expiration of the service of ten years of said sentence under the provision of Title 18, Section 4208(a)(1), U.S.C.

It Is Further Adjudged that defendant Gilbert be remanded to custody and his bond exonerated.

John A. Childress, Clerk, By C. A. Seitz, Deputy Clerk. Y-1/22/60.

[fol. 178] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 27865—Criminal

UNITED STATES OF AMERICA,

v.

R. MILO GILBERT

JUDGMENT—January 22, 1960

On this 22nd day of January, 1960, came the attorney for the government and the defendant appeared in person and [1] by his counsel, Albert A. Dorn.

It is Adjudged that the defendant has been convicted upon his plea of [2] not guilty to counts 1 through 35 inclusive and a verdict of guilty to counts 4 through 34 inclusive of the offenses of having aided in the preparation of false income tax returns; having forged endorsements on

---

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

U.S. Treasury Tax Refund checks; having caused false and forged U.S. Treasury Tax Refund checks to be presented to an office of the U.S.; of making false statements to an office of the U.S., namely that he was authorized to endorse the names of payees of U.S. Treasury Tax Refund checks; in violation of U.S. Code, Title 26, Sec. 7206(2), Title 18, Secs. 495 and 1001 as charged [3] in counts 4 thru 34 inclusive and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4] one year and one day on each of counts 4 through 34, inclusive, said sentences on said counts to run consecutively and not concurrently, and it is further adjudged that the defendant pay unto the United States of America the total sum of $5,000.00 as the cost of prosecution on counts 4 through 11, inclusive, and 23 through 34, inclusive, and it is further adjudged that the defendant shall become eligible for parole at the expiration of the service of ten years of said sentence under the provisions of Title 18, Section 4208(a)(1), United States Code.

It is Adjudged that [5]

It is Further Adjudged that the defendant be remanded to custody and the bond of the defendant is exonerated.

It is Ordered that the Clerk deliver a certified copy of this

---

[3] Insert "in count(s) number ——" if required.

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Leon R. Yankwich, United States District Judge.

The Court recommends commitment to: [6]

——, ——, Clerk.

[fol. 179] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 27865—Criminal

[Title omitted]

NOTICE OF APPEAL—Filed January 26, 1960

Name and address of appellant: R. Milo Gilbert, 2747N. Lincoln Street, Burbank, California.

Name and address of appellant's attorneys: Albert A. Dorn, 5710 West Manchester Avenue, Los Angeles 45, California; Wirin, Rissman, Okrand & Posner, 257 South Spring Street, Los Angeles 12, California.

Offense: U.S.C. Title 26, § 7206(2); Title 18, §§ 495 and 1001.

Concise statement of judgment or order, giving date, and any sentence: Sentence imposed January 22, 1960, written judgment dated January 25, 1960. Defendant was sentenced to one year and one day on each of 31 counts, to wit: counts 4 through 34, inclusive. Said sentences to run consecutively together with costs of prosecution fixed in the amount of $5,000.00, with the provision that defendant shall be eligible for parole when he shall have completed 10 years [fols. 180-183] of his sentence.

Name of institution where now confined, if not on bail: Los Angeles County Jail.

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[6] For use of Court wishing to recommend a particular institution.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: 25 January, 1960.

Albert A. Dorn, Wirin, Rissman, Okrand & Posner.
/s/ By Fred Okrand, Attorneys for Defendant and Appellant.

[fols. 184-185] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 27865—Criminal

[Title omitted]

SUPPLEMENT TO DESIGNATION OF CONTENTS OF RECORD ON APPEAL—Filed February 12, 1960

To the Clerk of the Above Entitled Court:

Please also include in the record on appeal the following:

1. Complaint issued by the Commissioner for the United States District Court, Southern District of California on January 2, 1959, entitled: "United States of America v. R. Milo Gilbert", the same being known as Commissioner's Docket 25, Case No. 181;
2. Indictment in Case No. 27646-CD in this Court, known as United States of America v. R. Milo Gilbert, defendant.

Albert A. Dorn, Wirin, Rissman, Okrand & Posner.
/s/ By Fred Okrand, Attorneys for Appellant.

[fols. 186-258] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 27865-Criminal

[Title omitted]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL—Filed February 9, 1960

To the Clerk of the Above Entitled Court:

The following is designated by Appellant as the record on appeal:

(1) The complete record and all the proceedings and evidence in the action.

Albert A. Dorn, Wirin, Rissman, Okrand & Posner.
s/ By Fred Okrand, Attorneys for Appellant.

[fol. 259] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 27865-Criminal

[Title omitted]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case; and that said items are the originals unless otherwise shown on this list:

Page:

1 Names and Addresses of Attorneys.
2 Commissioner's Complaint, Docket No. 25, Case No. 181, dated 1/2/59.

3 Indictment, filed in Case No. 27646, 5/13/59 (U.S.A. v. Gilbert).

25 Indictment, filed 8/5/59.

60 Minute Order 8/10/59 re arraignment and plea.

61 Minute Order 8/10/59 re filing of superseding indictment.

62 Minute Order 8/16/59 re plea, etc.

63 Motion for the return of seized property and the suppression of evidence, etc., filed 8/21/59.

74 Motion for Bill of Particulars, etc., filed 8/21/59.

77 Minute Order 8/31/59 re plea, etc.

78 Minute Order 9/21/59 re hearing on motion for bill of particulars, etc.

79 Memorandum in opposition to Defendant's motion to suppress evidence, filed 9/18/59.

81 Affidavit in opposition to motion for the return of seized property and suppression of evidence, filed 9/18/59.

85 Affidavit in opposition to a motion for the return of seized property and suppression of evidence, filed 9/21/59.

88 Affidavit of R. Milo Gilbert in support of motion for the return of seized property and suppression of evidence, filed 9/24/59.

95 Minute Order 10/5/59 re hearing on motion for return of seized property, etc.

96 Order re motion for return of seized property, etc., filed 10/23/59.

98 Trial Memorandum, filed 11/5/59.

106 Minute Order 11/10/59 re jury trial.

107 Minute Order 11/12/59 re further jury trial.

108 Minute Order 11/13/59 re further jury trial.

110 Minute Order 11/17/59 re further jury trial.

111 Minute Order 11/18/59 re further jury trial.

112 Minute Order 11/19/59 re further jury trial.

113 Minute Order 11/20/59 re further jury trial.

114 Minute Order 11/24/59 re further jury trial.

115 Court's Instructions to the Jury, filed 11/24/59.

142 Counsels' Proposed Jury Instructions, filed 11/24/59.

169 Minute Order 11/25/59 re further jury trial.

170 Transcript of note received from Foreman of the Jury, filed 11/25/59.

171 Jury Verdict, filed 11/25/59.

173 Minute Order 11/30/59 re continuance of sentence.

174 Notice for Judgment of Acquittal and Motion for New Trial, filed 12/3/59.

177 Minute Order 1/7/60 re continuance of sentence.

177-A Minute Order 1/22/60 re hearing on motion for new trial, etc.

178 Judgement, filed 1/22/60.

179 Notice of Appeal, filed 1/26/60.

181 Minute Order 1/25/60 re hearing motion defendant for bail pending appeal.

182 Substitution of Attorneys, filed 2/4/60.

184 Supplement to Designation of contents of record on appeal, filed 2/12/60.

[fol. 260] 186 Designation of contents of record on appeal, filed 2/9/60.

188 Affidavit and Application for extension of time within which to docket record on appeal ond Order, filed 2/26/60.

190 Affidavit and Renewal of Application for leave to prosecute appeal in forma pauperis pursuant to 28 USC 1915(a), etc., filed 4/6/60.

258 Order Permitting Appeal in Forma Pauperis, filed 4/6/60.

Original and two copies, consisting of eight volumes, of Reporter's Transcript of Proceedings had on:

August 10, 17, 31; Sept. 21; Oct. 5 and Nov. 10, 1959-Vol. 1
November 12, 1959-Volume 2
November 13, 1959-Volume 3
November 17, 1959-Volume 4
November 18, 1959-Volume 5
November 19 and 20, 1959-Volume 6
November 24 & 25, 1959; January 26, 1960-Volume 7
January 22, 1960-Volume 8

Plantiff's Exhibits 1 to 69 inclusive.
Defendant's Exhibits A to X, inclusive.
Dated: July 29, 1960

John A. Childress, Clark. By Wm. A. White, Deputy Clerk.

[fols. 211-277] IN THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Honorable Leon R. Yankwich, Judge Presiding

No. 27865-Criminal

UNITED STATES OF AMERICA, Plaintiff,

vs.

R. MILO GILBERT, Defendant

Reporter's Transcript of Proceedings—November 12, 1959
Los Angeles, California

APPEARANCES:

For the Plaintiff: Laughlin E. Waters, United States Attorney, By: Robert D. Hornbaker, Assistant United States Attorney, 600 Federal Building, Los Angeles, California.

For the Defendant: Albert A. Dorn, 5710 West Manchester Avenue, Suite 202, Los Angeles, California.

* * * * * * *

[fol. 278] Mr. Hornbaker: The Government calls Mr. Matorian.

SAM MATORIAN, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please sit down over here, sir.
What is your full name?
[fols. 279-280] The Witness: Sam Matorian.
The Clerk: S-a-m M-a-t-o-r-i-a-n; is that right?
The Witness: Yes.

Direct examination.

By Mr. Hornbaker:

. . . . . .

[fols. 281-284] Q. How did you happen to meet Mr. Gilbert?

A. Well, my wife met him first and I met him through my wife.

Q. Did you have any conversation with him about making income tax returns?

A. Oh, yes.

Mr. Dorn: I object to the questioning on the ground it is wholly immaterial. The only charge here is that the defendant without authority signed this man's name on a Government check.

The Court: Yes, but——

Mr. Dorn: Now, if he had a conversation with him regarding an income tax return, I don't see how it is material.

The Court: It would bear upon how he happened to have this check. I don't know whether this is a check for a refund or what it is. The Government has to show what the check was about.

. . . . . .

[fols. 285-328] Q. Mr. Matorian, I show you Government's No. 10 for identification and ask you to examine that.

A. Yes, sir, I see it.

Q. Is that your signature at the bottom of the front page on the left-hand side?

A. Yes, sir.

Q. In the bottom left-hand corner of the first page of Exhibit 10.

A. Yes, sir, that is my signature on there.

. . . . . .

[fol. 329] Redirect examination.

By Mr. Hornbaker:

Q. Mr. Matorian, I call your attention to Government's Exhibit No. 10, your 1956 return, to page 4 of that return, where it says "Income from business (less operating expenses)"——

The Clerk: Schedule D?

By Mr. Hornbaker:

Q. No, it is headed "1956 Income Tax Schedules. Income from business, sales $140.35".

A. Is that the one he means (indicating)?

Yes, sir.

Q. Did you have any business during 1956?

A. Well, it wasn't exactly a business, sir. I used to do a little work in my garage after working hours, yes, sir.

Q. Did you ever tell Mr. Gilbert that you had $300.00—what was that business?

A. Upholstering furniture only to friends or people [fols. 330-331] that I knew or recommendations. I never went out looking for business, sir.

Q. Page 4 shows $360.00 in sales promotion expense in connection with your upholstering work.

A. No, sir.

Mr. Dorn: If the court please, I object to the question. I don't believe it is material in any way, what the details of this return are.

The Court: There is no charge based upon that, Mr. Hornbaker.

Mr. Hornbaker: Well, counsel went into the $140.35 income.

The Court: I think we will confine ourselves to what you have charged and not create more confusion by bringing in other figures, because we are starting in on something new and something which is not charged specifically. You did not bring it out on direct and I will restrict and confine you to what you brought out on direct. No questions that the defendant's counsel asked opened up the door so as to allow you to bring in possible other improper deductions. You

have chosen not to charge him regarding this and you did not split it up as you did those other counts. It is enough to have 35 counts to pass on. Let's not have others.

I will sustain the objection.

* * * * * * *

[fols. 332-336] (Witness excused.)

* * * * * * *

Mr. Hornbaker: The Government calls Mrs. Matorian.

* * * * * * *

[fol. 337] STIPULATION RE GOVERNMENT'S EXHIBITS 10 AND 11

Mr. Dorn: If the court please, I am willing to stipulate that the original income tax return for 1956 for both Fay Matorian and Sam Matorian, in the portion of the blank which indicates home address, states, "c/o R. M. Gilbert, 519 Taft Building, Hollywood 28, California."

The Court: In typewriting?

Mr. Dorn: In typewriting.

[fols. 338-350] The Court: All right. Is the Government willing to accept the stipulation?

Mr. Hornbaker: Yes, sir.

The Court: All right. At the present time I will not accept the others. That is on Exhibits Nos. 10 and 11 for identification, at the present time they will not be admitted in view of the stipulation.

Mr. Hornbaker: That stipulation relates to Government's Exhibits 10 and 11, am I correct?

The Court: Yes.

* * * * * * *

[fols. 351-355] The Clerk: At this time the plaintiff has had marked for identification Plaintiff's Exhibits 15 through 26, inclusive.

(Documents were marked Plaintiff's Exhibits 15 to 26, inclusive, for identification.)

The Court: All right.

* * * * * * *

[fol. 356] (Witness excused.)

The Court: Call your next witness.
Mr. Hornbaker: The Government calls Mrs. Libling.

[fol. 357] TEMMA LIBLING, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please sit down over there.
What is your full name?
The Witness: Temma Libling.
The Clerk: Temma, T-e-m-m-a, L-i-b-l-i-n-g; is that right?
The Witness: Right.

Direct examination.

By Mr. Hornbaker:

Q. Mrs. Libling, what is your occupation?
A. I help my husband in his business.
Q. What is that business?
A. Delicatessen.
Q. What is your husband's name?
A. Nathan.
Q. Were you married to him in 1956?
A. Yes.
Q. I show you Government's Exhibit No. 15 for identification and ask you to look at that.
A. Yes, sir.
Q. Can you state what that is?
A. That is my income tax—our tax return for 1956.
Q. Does that bear your signature at the bottom right-
[fols. 358-359] hand corner of the front page?
A. Yes, it does.
Q. Does it bear your husband's signature at the bottom left-hand corner of the front page?
A. That's correct.
Q. Did Mr. Gilbert assist you in making out that return?

Mr. Dorn: If the court pleases, the only charge on this count is forgery of a Government check. If counsel is going into the tax returns of these taxpayers now, I suggest to the court it has no relation to this count whatsoever.

The Court: As I said yesterday when you made a similar objection about the testimony, they have to show what the check was for and how it came to be written, and in that respect the testimony is proper. The objection is overruled.

By Mr. Hornbaker:

Q. Mr. Libling, I call your attention to your home address on the first page of Government's Exhibit No. 15 and ask you if you ever told Mr. Gilbert that your home address was "c/o R. Milo Gilbert, 519 Taft Building, Hollywood 28, California."

A. No.

Q. Did you ever authorize him to put that home address on the face of your return?

A. No.

. . . . . .

[fols. 360-363] Mr. Hornbaker: I have no further questions.

Cross-examination.

By Mr. Dorn:

Q. Now, Mrs. Libling, Government's Exhibit No. 16 is the check from the Treasurer of the United States, is it not?

A. Yes, sir.

Q. But you did see Government's Exhibit No. 15 before, which is your tax return, did you not?

A. Not in completion.

Q. When did you see it?

A. I don't recall just when I saw that.

Q. Were you there when your husband signed it?

A. Yes, but it was not completed.

Q. Where was it signed?

A. At Milo Gilbert's office.

. . . . . .

[fol. 364] Mr. Dorn: Yes, thank you.
I have nothing further.
The Court: All right, Mr. Hornbaker.

Redirect examination.

By Mr. Hornbaker:

. . . . . .

[fols. 365-369] Mr. Hornbaker: I have nothing further.
The Court: All right.

Offers in Evidence

Mr. Hornbaker: At this time I offer into evidence Government's Exhibits Nos. 15 and 16.
The Clerk: May they be received, your Honor?
The Court: They may be received.
The Clerk: Plaintiff's Exhibits 15 and 16 in evidence.

(Documents marked Plaintiff's Exhibits 15 and 16 were received in evidence.)

. . . . . .

[fol. 370] James J. Manion, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please sit down, sir.
What is your full name, sir?
The Witness: James J. Manion.
The Clerk: M-a-n-i-o-n; is the correct?
The Witness: That's right.

[fols. 371-376] Direct examination.

By Mr. Hornbaker:

Q. Mr. Manion, what was your occupation from 1949 to 1956?
A. I was a public relations consultant.

Q. I show you Government's Exhibits 17 and 20 for identification.

A. Yes, I can identify them.

Q. What are those documents?

A. Exhibit 17 is the income tax return of James J. Manion for 1955.

Q. What is the other document?

A. Exhibit 20 is the income tax return for James J. Manion for 1956.

Q. Does your signature appear at the bottom left-hand corner of the first page of those exhibits?

A. Yes.

Q. Did Mr. Gilbert aid you in making out those returns?

A. Yes.

• • • • • • •

[fols. 377-382] Q. Mr. Manion, I call your attention to Government's Exhibit 20 for identification and Government's Exhibit 22 for identification.

A. Yes, I have them.

Q. Would you tell us what Government's Exhibit 20 is?

A. Government's Exhibit 20 is my income tax return for 1956.

• • • • • • •

[fols. 383-384] Q. Mr. Manion, I call your attention once more to Government's Exhibits 17 and 20, those are your 1955 and 1956 returns.

A. Yes.

Q. I call your attention to the top of those returns where it has your name and your home address.

A. Yes.

Q. Did you ever tell Mr. Gilbert that your home address was "c/o R. Milo Gilbert, 519 Taft Building, Hollywood 28, California"?

A. No.

Q. Did you ever authorize Mr. Gilbert to report on your income tax return that your home address was in care of R. Milo Gilbert, 519 Taft Building, Hollywood 28, California?

A. No.

• • • • • • •

[fols. 385-438] Mr. Hornbaker: I have no further questions.

* * * * * * *

[fol. 439] (Witness excused.)

MOTION FOR INTRODUCTION OF GOVERNMENT'S EXHIBIT NOS. 17 AND 20

Mr. Hornbaker: At this time I move for the introduction in evidence of Government's Exhibit No. 17.

The Court: All right, it may be received.

(Document marked Plaintiff's Exhibit 17 was received in evidence.)

Mr. Hornbaker: I also move for introduction into evidence Government's Exhibit No. 20.

The Court: It may be received.

(Document marked Plaintiff's Exhibit 20 was received in evidence.)

* * * * * * *

[fol. 440] Mr. Hornbaker: The Government calls Manon Manion.

MANON MANION, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please sit down.

What is your full name?

The Witness: Manon Manion.

The Clerk: That is M-a-n-o-n M-a-n-i-o-n; is that right?

The Witness: Yes.

Direct examination.

By Mr. Hornbaker:

. . . . . .

[fols. 441-446] Q. I show you a copy of Government's Exhibit No. 18 and Government's Exhibit No. 21 for identification.

A. Yes.

Q. Can you identify those documents?

A. No. 18 is a 1955 tax return and 21 is a 1956 tax return.

Q. Is that your signature at the bottom of the first page of Government's Exhibit 18 for identification?

A. Yes.

Q. Is that your signature at the bottom of the first page of Government's Exhibit 21 for identification?

A. Yes.

. . . . . .

[fols. 447-448] Mr. Hornbaker: I have no further questions.

Cross-examination.

By Mr. Dorn:

. . . . . .

[fol. 449] Mr. Dorn: I have nothing further, your Honor.

Mr. Hornbaker: I have nothing further.

The Court: All right, step down.

(Witness excused.)

The Court: Call your next witness.

[fol. 450] Mr. Hornbaker: The Government calls Mr. Bartfield.

DANIEL BARTFIELD, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your full name, sir?
The Witness: Daniel Bartfield.
The Clerk: Again, sir.
The Witness: Daniel Bartfield, B-a-r-t-f-i-e-l-d.
Mr. Hornbaker: May I have these marked as Government's exhibits?
Mr. Dorn: Have you shown those to me?
Mr. Hornbaker: No, but I will as soon as they are marked.
The Clerk: At this time the plaintiff has had marked for identification Plaintiff's Exhibits 31, 32, 33 and 34.

(Documents were marked Plaintiff's Exhibits 31, 32, 33 and 34 for identification.)

(Documents were handed to defense counsel.)

Direct examination.

By Mr. Hornbaker:

Q. Mr. Bartfield, what is your occupation?
A. I am self-employed, sir.
Q. What is your business?
A. I am in the stitching business, in the women's wear business.
[fol. 451] Q. Does your firm have a name?
A. Yes, it is Art Craft Tucking & Stitching Company.
Q. Is that a corporation or a partnership?
A. It is a partnership.

Mr. Dorn: Pardon me, it is kind of difficult to hear you, Mr. Bartfield.
The Witness: It is a partnership.

By Mr. Hornbaker:

Q. Mr. Bartfield, I show you Government's Exhibits 33 and 34 for identification.
A. Yes.
Q. Can you tell us what those documents are?
A. These are income tax forms.

Q. Is that your signature that appears at the bottom of the first page on the left-hand corner of Government's Exhibit 33 and Exhibit 34?

A. Yes, sir.

Q. Did you put your signature on there?

Mr. Dorn: He says it is his signature. I assume that he did.

The Witness: It looks like my signature. I guess I did.

By Mr. Hornbaker:

Q. Did Mr. Gilbert aid and assist you in making out those returns?

A. Yes.

Q. I call your attention to the top of those returns where it says, "Home Address, c/o R. Milo Gilbert, 519 Taft [fol. 452] Building, Hollywood 28, California". Did you ever tell Mr. Gilbert that that was your home address?

A. No, Sir.

Q. Did you ever authorize Mr. Gilbert to use that as your home address?

A. No, sir.

Mr. Dorn: Pardon me, counsel, are you referring to the same exhibits that the witness is looking at? Are you referring to Exhibits 33 and 34?

Mr. Hornbaker: Yes, I am.

The Witness: On the form, on the piece of paper over here, it is "519 Taft Building". Here it is "1142 South Doheny". That is Exhibit 33. On 34 it says, "620 South Main". These are checks (indicating).

By Mr. Hornbaker:

Q. Mr. Bartfield, I show you Government's Exhibitis 31 and 32. Did you ever authorize Mr. Gilbert to have any tax refund checks made payable to you and sent to him?

A. No.

Q. I call your attention to the back of Government's Exhibit 31. It that your signature on the back of that document?

A. No, sir.

Mr. Dorn: The court please, if it will save any time, I

will stipulate that those signatures on those checks are [fol. 453] signed by Mr. Gilbert in Mr. Gilbert's handwriting. This witness did not sign them.

The Court: All right.

Mr. Dorn: There is no contention here that he did.

By Mr. Hornbaker:

Q. Did you ever authorize Mr. Gilbert to sign your name or to endorse your name on Government's Exhibit 31 or Government's Exhibit 32?

A. No, sir.

A. Has Mr. Gilbert ever been appointed your trustee in any legal proceedings?

A. No.

Q. Have you ever orally stated to anybody that Mr. Gilbert was your trustee?

A. No, sir.

Q. Has he ever, in fact, been your trustee?

A. No, sir.

Q. When was the first time you saw those Government's Exhibits 31 and 32?

A. When the Government men brought them to my home, they showed them to me.

Mr. Hornbaker: I have no further questions.

The Court: All right, cross examination.

Mr. Dorn: You have seen this power of attorney, haven't you, Mr. Hornbaker?

Mr. Hornbaker: Yes, I have.

[fol. 454] Mr. Dorn: Do you want to see it again?

Mr. Hornbaker: No.

The Clerk: Defendant's Exhibit M marked for indentification.

(Document was marked Defendant's Exhibit M for identification.)

Cross-Examination

By Mr. Dorn:

Q. I direct your attention, Mr. Bartfield, to Defendant's Exhibit M for identification, which contains the

words at the top, "Power of Attorney", and ask you if that is your signature on the left-hand side.

A. It is.

Q. Do you remember signing it?

A. No.

Q. But it is your signature?

A. Yes.

Q. There is no question in your mind about it?

A. It certainly looks like my signature.

Q. And the signature on the right, does that look like your wife's signature?

A. Yes.

Q. Is there any question in your mind about that?

A. Yes.

[fol. 455] Q. You mean it does look like her signature?

A. It looks like her signature.

OFFER IN EVIDENCE

Mr. Dorn: I offer Defendant's M in evidence.

Mr. Hornbaker: I have no objection.

The Court: It may be received.

The Clerk: Defendant's Exhibit M in evidence.

(Document marked Defendant's Exhibit M was received in evidence.)

Mr. Dorn: I have nothing further.

Mr. Hornbaker: I have one question on redirect examination, your honor.

May I see the document?

The Court: Here, that is all right, I am looking at it. Go ahead.

Redirect Examination

By Mr. Hornbaker:

Q. Mr. Bartfield, I show you Defendant's Exhibit M and call your attention to the lower left-hand corner of that document, which says:

> "On April 10, 1957, before me, the undersigned, a Nothary Public in and for said County and State, personally appeared Daniel H. Bartfield . . ."

that is you, isn't it?

A. Yes.

[fol. 456] Q. ". . . and Charline R. Bartfield, known to me to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same."

This is signed by Ruth Gilbert. Did you ever appear before Ruth Gilbert and take any such oath?

A. No, I didn't.

Mr. Hornbaker: I have no further questions, your honor.

Recross-Examination

By Mr. Dorn:

Q. But that is your signature on there; you don't deny that it is?

A. No, I don't. It looks very much like my signature. I honestly don't remember signing it.

Q. Is there any question in your mind at this time that that is your signature?

A. It looks like my signature. I honestly don't know. I might have signed it. I don't remember signing it.

Q. In other words, what you are trying to say now is that that is your signature, but you do not now have any memory of signing it?

A. What I am trying to say, I could swear it is my signature, but I do not remember signing it.

Mr. Dorn: All right, that is all.

[fol. 457] Redirect Examination

By Mr. Dorn:

Q. Mr. Bartfield, did Mr. Gilbert ever ask you to sign a power of attorney?

A. I don't remember that he did.

Mr. Hornbaker: I have no further questions.

Recross-Examination

By Mr. Dorn:

Q. By the way, you do know Ruth Gilbert, do you not?
A. Yes.
Q. You have met her many times?
A. I have met her several times.

Mr. Dorn: I nothing further.
The Court: All right.

(Witness excused.)

Mr. Hornbaker: The Government calls Charline Bartfield.

CHARLINE BARTFIELD, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please sit down there. What is your full name, ma'am?
The Witness: Charline Bartfield.
The Clerk: C-h-a-r-l-i-n-e and ——
[fol. 458] The Witness: B-a-r-t-f-i-e-l-d.
The Clerk: Thank you.

MOTION FOR INTRODUCTION OF GOVERNMENT'S EXHIBITS NOS. 25 AND 26

Mr. Hornbaker: At this time, your Honor, I would like to move for the introduction into evidence of Government's Exhibits 25 and 26.
The Court: They will be received.
The Clerk: Government's Exhibits 25 and 26 received in evidence.

(Documents marked Plaintiff's Exhibits 25 and 26 were received in evidence.)

Direct examination.

By Mr. Hornbaker:

Q. Mrs. Bartfield, what is your occupation?
A. I am a ready-wear buyer.
Q. What is your husband's name?
A. Daniel Bartfield.
Q. Is he the witness who just testified in this case?
A. Yes, sir.
Q. I show you Government's Exhibits 31 and 32.
A. Would you mind? I don't know which are which.

Mr. Dorn: Counsel, I will stipulate again that Mr. Gilbert signed those, endorsed those checks and those checks were not signed by the witness.

Mr. Hornbaker: I will accept the stipulation.

The Court: All right.

[fol. 459] By Mr. Hornbaker:

Q. Did you ever authorize Mr. Gilbert to receive any tax refund checks that were payable to you?
A. I did not.
Q. Did you ever authorize Mr. Gilbert to sign Government's Exhibits 31 and 32 or any other checks?
A. I did not.
Q. Has Mr. Gilbert ever been your trustee?
A. No, sir.
Q. Has he ever been appointed your trustees in any legal proceeding?
A. No, sir.
Q. You never orally stated to anybody that he was your trustee?
A. I didn't.

Mr. Hornbaker: I have nothing further.

Cross-examination.

By Mr. Dorn:

Q. Mrs. Bartfield, I show you Defendant's Exhibit M, which is a power of attorney, and direct your attention to a signature on the right-hand side and ask you if that is your signature.

A. It looks very much like my signature and I think it perhaps is.

[fol. 460] Mr. Dorn: I have nothing further.

Redirect examination.

By Mr. Hornbaker:

Q. Mrs. Bartfield, I call you attention to the lower left-hand corner of Defendant's Exhibit M and particularly to that part which says:

> "On April 10, 1957, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Daniel H. Bartfield and Charline R. Bartfield . . . "

that is you, isn't it?

A. That is.

> Q. ". . . known to me to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same."

It is signed "Ruth Gilbert". Did you ever appear before Ruth Gilbert and ackowledge that you signed this power of attorney?

A. I never appeared before Ruth Gilbert. I don't know Mrs. Gilbert.

Q. I call your attention to your signature "Charline R. Bartfield". Do you usually endorse your name with the "R" inside the "B" as shown on that document?

A. No, I don't.

[fol. 461] Mr. Dorn: If the court please, I don't know what difference that makes. She says it is her signature.

The Court: That is all right.

Mr. Hornbaker: I have nothing further.

The Court: Go ahead.

Recross-examination.

By Mr. Dorn:

Q. Mrs. Bartfield, you do know Mrs. Ruth Gilbert, do you not?
A. I do not know Mrs. Gilbert.
Q. You have never met her?
A. I have never met her.
Q. You have never been at her home?
A. I have never been in Mrs. Gilbert's home.

The Court: All right, anything further from this witness?
Mr. Dorn: Just one other question, your Honor.

By Mr. Dorn:

Q. Don't you remember being at a party given by Mr. Gilbert for his son about two years ago?
A. I remember being at a party. I was not introduced to Mrs. Gilbert.
Q. You don't know who Mrs. Gilbert is?
A. No, I don't, and if she were here, I wouldn't be able to recognize her if I saw her, because I don't even [fol. 462] remember seeing her. There was quite a crowd there.
The Court: All right.

Redirect Examination

By Mr. Hornbaker:

Q. Mrs. Bartfield, has Mr. Gilbert ever asked you to sign a power of attorney?
A. No, he didn't.

Mr. Hornbaker: I have nothing further.

(Witness excused.)

MOTION FOR INTRODUCTION OF GOVERNMENT'S EXHIBIT 31 AND 32

Mr. Hornbaker: The Government calls Mr. Allan Frankel.

At this time, your honor, I move for the introduction into evidence of Government's Exhibits 31 and 32.

The Court: They will be received.

The Clerk: Government's Exhibits 31 and 32 in evidence.

(Documents marked Plaintiff's Exhibits 31 and 32 were received in evidence.)

ALLAN S. FRANKEL, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please sid down, sir.
What is your full name?

The Witness: Allan S. Frankel.

The Clerk: A-l-l-a-n S. F-r-a-n-k-e-l, is that right, sir?

[fol. 463] The Witness: That's correct.

Direct Examination

By Mr. Hornbaker:

Q. Mr. Frankel, what is your occupation?

A. I am a manufacturer's representative.

Q. How long have you held that job?

A. Since 1953, approximately.

Q. I show you Government's Exhibit 27 and 28. Can you identify those documents?

A. Exhibit No. 27 is a U.S. Individual Income Tax Return for the year 1956.

Exhibit No. 28 is a U.S. Individual Income Tax Return for the year 1956.

Q. I call your attention to the bottom left-hand corner of page 1 of Government's Exhibit 27 for identification and ask you if that is your signature.

A. That is not my signature.

Q. Did Mr. Gilbert aid and assist you in the preparation of your 1956 return?

A. Yes, he did.

Q. Did you give him some information to prepare your 1956 return?

A. I gave Mr. Gilbert whatever information he requested to aid him in preparing my return.

[fols. 464-479] Mr. Dorn: If the court pleases, I would like to point out to the court that this is a forgery count and counsel seems to be going into the tax return itself.

The Court: As I have ruled before, the relationship of the check to the whole transaction may be gone into so as to tie the checks to the transaction.

. . . . . .

[fols. 480-481] Mr. Dorn: I have nothing further, your Honor.

Mr. Hornbaker: I have nothing further, your Honor.

(Witness excused.)

. . . . . .

[fol. 482] MOTION FOR INTRODUCTION OF GOVERNMENT'S EXHIBITS NOS. 27 AND 29

Mr. Hornbaker: I would like to move for the introduction of Government's Exhibits 27 and 29 into evidence.

The Clerk: The income tax returns?

Mr. Hornbaker: I thought Exhibit 27 was Allan Frankel's 1956 return, and 29 was the check payable to Allan Frankel.

The Clerk: Exhibit 27 is the 1956 tax return of Allan Frankel and Exhibit 29 is the check made payable to Allan Frankel.

The Court: All right, they may be received.

[fol. 483] The Clerk: Plaintiff's Exhibits 27 and 29 in evidence.

(Documents marked Plaintiff's Exhibits 27 and 29 were received in evidence.)

DOLORES J. FRANKEL, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your full name?
The Witness: Dolores J. Frankel.

Direct examination.

By Mr. Hornbaker:

Q. Mrs. Frankel, what is your husband's name?
A. Allan S. Frankel.
Q. What is your occupation?
A. I am a housewife.
Q. I show you Government's Exhibit 28 for identification and ask you to take a look at it.
A. Yes, it is a tax return for 1956, an individual income tax return.

. . . . . .

[fol. 484] Mr. Hornbaker: I have nothing further.
Mr. Dorn: I have nothing from this witness.
The Court: All right, step down.

(Witness excused.)

[fols. 485-493] MOTION FOR INTRODUCTION OF GOVERNMENT'S EXHIBITS NOS. 28 AND 30

Mr. Hornbaker: Your Honor, I would like to move for the introduction of Government's Exhibits 28 and 30 in evidence.
The Court: All right, they will be received.

(Documents marked Plaintiff's Exhibits 28 and 30 were received in evidence.)

. . . . . .

[fol. 494] MOTION FOR INTRODUCTION OF GOVERNMENT'S EXHIBITS NOS. 18, 21, 12 AND 13

Mr. Hornbaker: At this time, your Honor, I would like to move for the introduction in evidence of Government's Exhibits 18 and 21, which are the tax returns for Manon Manion.

I would also like to move for the admission in evidence of Government's Exhibits 12 and 13, which were the United States Treasury checks made payable to Sam and Fay Matorian.

The Court: All right.

The Clerk: May they be received, your Honor?

[fols. 495-593] The Court: They may be received.

The Clerk: Government's Exhibits 12, 13, 18 and 21 in evidence.

(Documents marked Plaintiff's Exhibits 12, 13, 18 and 21 were received in evidence.)

. . . . . .

[fols. 594-595] MOTION FOR INTRODUCTION OF GOVERNMENT'S EXHIBITS NOS. 10 AND 11

Mr. Hornbaker: At this time, your Honor, I would like to offer in evidence Government's Exhibits No. 10 and 11.

The Court: What are these?

The Clerk: These are two income tax returns of Sam Matorian and Fay Matorian for 1956. Mr. Hornbaker held them in reserve.

[fol. 596] The Clerk: The 1956 income tax returns for Sam and Fay Matorian, Exhibits 10 and 11.

. . . . . .

[fols. 597-602] The Clerk: May Plaintiff's Exhibits 10 and 11 be admitted in evidence now, your Honor?

The Court: All right, the photostatic copies will be substituted for the originals, which I order be returned to Mr. Hornbaker.

(Documents marked Plaintiff's Exhibits 10 and 11 were received in evidence.)

. . . . . .

[fols. 603-619] Mr. Hornbaker: The Government rests.

* * * * * * *

[fol. 620] The Court: All right. Call your first witness
Mr. Dorn: Mr. Gilbert.

R. MILO GILBERT, the defendant herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your full name?
[fols. 621-633] The Witness: R. Milo Gilbert.

Direct examination.

By Mr. Dorn:

* * * * * * *

[fol. 634] Q. Mr. Gilbert, will you please talk into the microphone?

Have you had occasion to have clients of yours sign powers of attorney authorizing you to negotiate a refund check?

A. So many, I can't even count them.

Q. How long have you had that practice?

A. Years ago, a number of years, maybe ten years or more, at least.

Q. Have you known that practice to exist among other persons preparing tax returns?

A. Yes.

Q. What were the reasons for you having these people sign these powers of attorney?

A. So that the refund checks, when received by me, could be deposited in my trustee account and would show that there had been an agreement between the client and myself and to show authorization for the transaction.

Q. During all this period did you maintain trustee accounts in banks?

A. Yes, I did.

Q. In what banks did you maintain these trustee accounts?

A. In many banks.

[fol. 635] Q. During 1955, 1956, 1957 and 1958, did you maintain such accounts?

A. Yes, I did.

Q. In what banks?

A. There were two in the Bank of America; one was in the Toluca Lake Branch in Burbank and another one was at the Brooklyn-Cummings Branch in Los Angeles.

I believe there was one at the Sun Valley National Bank in Sun Valley.

There was a savings account at the Guardian Thrift in Los Angeles.

Q. When you would receive a refund check from the Government, which bore a taxpayer's signature as payee, and under which you had what you felt was authority to endorse that check, what did you do with that check?

A. I would call the client and tell him that I had received it—well, maybe not at this time—I would deposit the check in the bank in one of the trustee accounts.

Q. What funds were in those trustee accounts?

A. Trust funds.

Q. In other words, what would you use those trustee accounts for?

A. For business purposes, trust funds for clients. I have occasions where, besides these tax refunds, clients entrust money to me to pay bills for them and I disburse funds [fol. 636] for them.

Q. In other words, this trustee account was an account where you kept clients' funds.

A. That's right.

Q. Would that subject be discussed with the client at the time or around the time you were preparing the return?

A. By all means, very emphatically.

Q. What would you tell them you were going to do with the check?

A. I would tell them exactly what I was going to do with the check. It told them that unless the client agreed for the check to come to my office, I just didn't want to handle the case, period; and just what would be done with the check, it would go into the trust account. I may not have told

them which bank it was going to go into, but I told them it was going into a trust account.

Q. Did you have occasions in the last four or five years when you handled a claim for refund under a contingency basis to use the taxpayer's residence as the address of the taxpayer on the return?

A. You mean on some cases where, instead of my office address, the address of the taxpayer was used?

Q. Yes.

A. Yes, I can think of one offhand. I am trying to think of a second one. There is one offhand that I can remem-

[fol. 637] ber.

Q. Which one was that?

A. Louis Dunoff.

Q. In other words, in that case you used the taxpayer's residence address ——

A. That's right.

Q. — on the tax return instead of your office address?

A. That's right.

Q. Did you have any reason for that?

A. His was not exactly a contingency basis.

Q. Did you have any special reason for handling it in that fashion?

A. I told him that my fee for time would not exceed 50 per cent. I told him I would keep it down to that. It was on a per diem basis.

Q. After these checks were deposited in these trustee accounts, what did you do with the funds? How would you disburse them?

A. That would depend upon how early — at the time of the year that the funds were received. Generally, the funds were disbursed by me in December, unless there was some particular reason for doing it before.

Q. Why December?

A. Because I wanted to protect the client from receiving a refund and having a question come up on it later and in

[fols. 638-907] the interim having the client spend the money, and if he had to make any settlement, not to have the funds to be able to do it with. Plus the fact that if I disbursed the funds to the client, I must take some money for myself, my share of it. I am liable to spend the money, too, and if I have to come back with part of it. it may be an

imposition on me, so I would leave the funds in the trustee account.

In late November or December, when I felt, well, nothing has developed, another year is coming soon, and I might just as well make the disbursement now, I mean, at that time.

Q. And all of the funds then which you had deposited in these trustee accounts would be disbursed to your clients in accordance with your agreement with them?

A. Yes. Now, these disbursements are not always made in late November or December, but the great bulk of them are. There may be cases where they are disbursed earlier and there have been, too.

For example, I settled a case for a client where I think the refund was about $1,500.00. There had been an audit over a period of three years. The audit had been gone into in such tremendous detail that I felt that when the funds were received, this was a closed case, period, no ifs, ands or buts about it, and the money was received around May or June. There was no point in having the funds held six or seven months needlessly. It was disbursed immediately.

* * * * * * *

[fol. 908] Q. Mr. Gilbert, directing your attention to the times when you endorsed the various refund checks which are in evidence in this case, did you have any belief at that time that you had any authority to endorse those checks on behalf of the named payees?

[fols. 909-911] A. I believed so.

Q. What was your belief based upon?

A. The belief was based upon the conversation I had with the clients, the understanding that we had, and that the powers of attorney that were signed, I believed I had them for all, at least I thought I did.

Q. Did any of the persons named in any of these same checks ever indicate to you at any time after the Government checks were deposited in your trustee account, or at any time after they had received their agreed amount received by you, did they ever indicate to you that you had no authority to endorse those Government checks?

A. No.

* * * * * * *

[fols. 912-934] Mr. Dorn: I have nothing further, your Honor.

The Court: All right, Mr. Hornbaker.

Cross-examination.

By Mr. Hornbaker:

* * * * * * *

[fol. 935] The Court: I gather from your conversation yesterday that you carried a personal account in addition to the trustee account.

The Witness: Not there.

The Court: You did not?

The Witness: Not at this branch.

By Mr. Hornbaker:

Q. Have you finished your explanation?

A. Yes.

Q. Were these checks deposited in the name of either Mr. or Mrs. Manion?

A. They were deposited to my trustee account.

Q. How is that trustee account held, in whose name?

A. Mine as trustee.

Q. Is there any notation in the bank records that these were deposited for the account of Mr. or Mrs. Manion?

A. I don't think so. It is a trustee account. It is quite obvious it is other people's money.

Q. Is that account in the Toluca Lake Branch of the Bank of America entitled "R. Milo Gilbert"——

A. "Trustee".

Q. Did you put all of these checks of the taxpayers in the R. Milo Gilbert trustee account?

[fols. 936-961] A. All which checks?

Q. Well, did you put the Matorians' checks in there?

A. All of the checks that are involved here in this case, yes.

Q. There was no designation in the bank records that this money was held in trust for any particular person, was there?

A. There was a designation of the bank records that is moneys held in trust.

. . . . . .

[fol. 962] By Mr. Hornbaker:

Q. Mr. Gilbert, I show you Defendant's Exhibit M for identification, and Exhibit N. What is Defendant's Exhibit M?

A. It is a power of attorney from Daniel Bartfield and Charline R. Bartfield, husband and wife.

A Juror: We cannot hear very well.

[fol. 963] Mr. Dorn: Mr. Gilbert, you will have to talk into the microphone. I don't think they can hear.

The Witness: It is a power of attorney from Daniel Bartfield and Charline R. Bartfield. If you read the words in here, it definitely does give me the authority.

By Mr. Hornbaker:

Q. Mr. Gilbert, is that your printing or your handwriting on the Defendant's Exhibit M above the words "giving and granting"?

A. Yes, I prepared this power of attorney.

Q. Did you put in the words "power of attorney for all matters pertaining to our Federal and California State income taxes . . ."?

A. Did I put in the words of "power of attorney"? I put in the words exactly as written here and you can read it for yourself.

Q. Did you put in the words, "This includes the filing . . . of necessary refund claims; and the receiving depositing, endorsing and otherwise negotiating such refund checks . . ."?

A. I believe this power of attorney speaks for itself.

Mr. Hornbaker: Will you read the question?

(Pending question was read by the reporter.)

The Witness: Whatever is on this document, I put on, nothing more and nothing less.

By Mr. Hornbaker:

Q. You see the little word "endorsing" on that power of [fols. 964-969] attorney.

A. It says, "This includes the filing and signing of tax returns and all other necessary forms, such as extension of time," et cetera, "and the filing of necessary refund claims; and the receiving, depositing, endorsing and otherwise negotiating such refund checks at his sole discretion . . ."

Q. When did you put this writing on this power of attorney?

A. At the time I prepared it.

Q. When was that?

A. April 10, '57.

Q. When did you insert the little word "endorsing"?

A. At the precise time after I wrote it. I wrote it and I read it and put that in.

. . . . . .

By Mr. Hornbaker:

Q. Who is Ruth Gilbert?

A. My wife.

. . . . . .

[fol. 970] Mr. Hornbaker: I have no further questions.

The Court. Any redirect?

Redirect examination.

By Mr. Dorn:

. . . . . .

[fols. 971-972] Mr. Dorn: I have nothing further.

Mr. Hornbaker: I have no recross examination.

The Court: All right, step down.

(Witness excused.)

The Clerk: Do you want these in evidence, Mr. Hornbaker?

Mr. Hornbaker: No.

The Court: All right. Anything further, Mr. Dorn?

Mr. Dorn. I have nothing further, if the court please.

The Court: You rest then?

Mr. Dorn. I rest. That is the defendant's case.

The Court. All right. Any rebuttal?

Mr. Hornbaker: Yes, the Government calls Mr. Borchardt.

* * * * * * *

[fol. 973] The Court: All right, step down.

(Witness excused.)

* * * * * * *

[fol. 974] Mr. Hornbaker: The Government rests, your Honor.

* * * * * * *

(Whereupon, the jury retired from the courtroom, and the following proceedings were had in its absence:)

The Court: Gentlemen, I thought we should have this hearing. Do you have any motions you want to make?

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Mr. Dorn: Yes, I have, if the court please.

The defendant moves that the court direct a verdict for the defendant on all counts in the Indictment. I won't take up too much of the court's time on this. I think that several things are possibly important in connection with this motion.

The Court: Go ahead. I am listening.

Mr. Dorn: I would first like to direct the court's attention to the forgery counts where the Government checks are involved, and to the question of the endorsement on the checks. I do not believe, under the cases which are contained [fol. 975] in the proposed defendant's instructions and under authorities on the point, that what has been testified to constitutes forgery.

The Court: Let me tell you that you misconceive the statute. I have read the two cases. That statute is broader than that state statute for forgery. The decision that you

cited in 27 F. (2d) was decided before Swift v. Tyson was repudiated when the Supreme Court held later on there is no such thing as federal common law. Therefore, it is no longer the rule.

In the case that went up from this Circuit, the Supreme Court has held under those circumstances the impersonation of a person makes a bank liable. The same is true of the case of the People v. Bendit, because there the court drew a very narrow distinction between forgery. The statute under which it is brought alleges "whoever makes any false and fraudulent statement," and is broad enough to cover an act where the man represents himself to be a trustee, when in fact he is not.

There is also—what is the other section?

Mr. Dorn: That is Section 495, Title 18, the forgery statute.

The Court: Yes, but 495 is very broad. As a matter of fact, the Supreme Court has held that each of those is a separate offense. That is why in ordinary Government check cases the Government charges both forgery and [fol. 976] uttering, although, of course, we don't impose a double penalty. In other words, the construction that the Supreme Court has based upon these sections is a very, very broad one.

I don't think those cases are controlling at all. I have read them.

Mr. Dorn: If the court please, it would seem that the controlling point in the alleged violation under this Section 495 would be whether the instrument was in fact forged.

The Court: If it were endorsed by one who had no authority, the mere fact that he wrote above would not make it any less forgery. I doubt if we would follow the old case in California at the present time.

Mr. Dorn: If the court please, I don't think it would be followed for the present time, but for a different reason. You see, the present statute in California has specifically added in the statute itself "whoever endorses without authority." In other words, they added these words "without authority" in the forgery section.

The Court: The Supreme Court of the United States has held repeatedly that forgery doesn't mean merely adding a man's name. If you put his name down as trustee when you

are not trustee, and there is testimony in the record that he never was made a trustee, which the jury believed, that is sufficient and I will instruct the jury as requested in Government's Instruction No. 20.

[fol. 977] I will also state that authority to receive the money also may be given either orally or in writing. I think I told you that before.

Mr. Dorn: Yes, your Honor.

The Court: In other words, the Supreme Court of the United States made a very broad interpretation. This section is one of the broadest statutes, because with so many people receiving Government checks of one kind or another, unless you interpret it broadly, you would have difficulty.

I have tried many cases involving people going to a mailbox and stealing them. People have been prosecuted for going into an old-fashioned rooming house where each tenant had a box and pulled somebody else's check and endorsed it.

The Government might not be able to prove by handwriting that it was, so an endorsement is fictitious when the man puts the name of somebody else by himself as trustee when he is not trustee.

Mr. Dorn: If the court please, I think, in my opinion at least, it would be entirely misconstruing the significance of the word "trustee" on that endorsement. I think it is the general practice to put down, in endorsing a check, the name of the account to which the check is to be deposited. For instance, it might have been a special account——

The Court: That is right.

Mr. Dorn:—then the endorser would write "Special [fol. 978] Account," "Trustee Account," or "Trustee" and whatever name the account was in.

I think it would be misconstruing that, especially if the jury were told that this man would have to be a trustee to make that endorsement. I think it has been explained. There has been no other evidence that that endorsement was put on there to signify that it was going into a trustee account.

The Court: There is no authority to put it in the account. I realize that lawyers, for instance, have authority to receive money in a judgment. You know, even lawyers have been prosecuted for commingling their accounts with trustee

accounts. Now, at the Clerk's Office I have seen checks where they say, "Smith and Jones, Clients," which means that either they have received costs from the client which are put there and are drawn against this account, but the tax accountant is not authorized to become a trustee. By the force of his office, he does not have any authority to seize the checks which go to the client.

Mr. Dorn: I would say this: He would have no authority unless something was done or said. Nevertheless, the fact that the checks were endorsed in the name of the payee by the defendant trustee, signifying that it was going into a trustee account, if the court please, I don't believe that the jury should be informed——

[fol. 979] The Court: You are just misconceiving the law. I am telling you what the law is and the very cases you cite would not be followed in the federal court, because those statutes are the broadest statutes we have and there are hundreds of prosecutions under them.

If that is true, then all a man would have to do is mark "L.R.Y", if it were a check of mine, after the words "by" so-and-so, and get by with it.

The bank at the present time is liable. I am trying to remember the cases. One came from the Ninth Circuit and another from the Second. One was some mortgage company.

The California statutes draw a distinction between impersonation and forgery. I followed that in one case and it didn't go beyond the Court of Appeals. Then an Eastern case arose and the Supreme Court knocked it into a cocked hat and said that it was a fictitious distinction and that a man who signed a name is representing that he is the man and has authority, and the bank is liable.

Mr. Dorn: I would say, if the court please, it is undoubtedly true that when a check is endorsed by one who represents himself to be an agent of the payee, in other words, he signs the payee's name by himself, and if the bank pays that check where it is deposited, then and if it should later turn out the drawer of the check should disclaim the authority of the agent to sign that check, then I assume the check would be charged back all the way down [fol. 980] the line. It is the paying bank that would have the responsibility.

The Court: No, you would change the statute into civil liability, which it is not, because the section is very broad.

Mr. Dorn: As I understand the theory behind it——

> The Court: "Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from United States or any officers or agents there, any sum of money; . . ."

The courts have held you can prosecute them under both uttering and doing. As a matter of fact, as I told you, in these ordinary cases, the Government is not here, it charges both making and uttering. Of course, if there is a conviction I always consider it as one offense. The Government merely protects itself. It was recently since the Pierce case, which held that entering a bank and then robbing the bank is the same offense, it was attempted to apply that to this statute. The court held that it does not apply.

Then Section 1001 says:

> "Whoever in any matter conceals or covers up by any trick, scheme or devises a material fact or makes any false, fictitious or fraudulent statements . . ."

[fol. 981] It is like my friend Judge Langdon once said in a famous case. I think he was on the Court of Appeals at the time—he spoke about a situation and said it was as though a thief stealing money left a receipt and expected to escape by changing it into a debt and saying, "I took it and some day I am going to pay it back."

Mr. Dorn: As I understand it, if the court please, the theory behind this Bendit case, which I have cited, and the other cases I have cited, is simply that an endorsement is not forged if it purports to be what it actually says.

The Court: I wouldn't follow it, because, in the first place, that is no longer a law since the early Tompkins case, because that was decided in the olden days where it was said there was such a thing as federal commercial law. They even cite Swift v. Tyson. Swift v. Tyson was knocked into a cocked hat when the Supreme Court said

there is no such thing as general common law. Therefore, in matters relating to forged instruments and the like, you go by state law.

Mr. Dorn: By the way, your Honor, this case does cite the California case of People v. Bendit.

The Court: It is not a law any more because we are not governed by it. Besides, as I said, the statute is much broader.

Mr. Dorn: At least, I would say this, it is my view that the forgery counts which are drawn under Section 495 and not Section 1001, which is a different section, at least those [fols. 982-989] drawn under Section 495, which is clearly a forgery section, that is what it purports to be, to punish the making and uttering of forged documents, including checks, and I suggest to the court that this endorsement, even though it was without authority, was not a forged endorsement.

The Court: He falsified the power of attorney. There are so many words in that statute that you can go into any one of them. He forged the power of attorney by representing himself to have authority as trustee to collect. I wouldn't follow a case as narrow as those cases.

* * * * * * *

[fol. 990] The Court: The motion for a directed verdict will be denied.

Now, gentlemen, let's go over the instructions.

* * * * * * *

[fols. 991-1084] The Court: I will not give any of the three instructions suggested by the defendant. They do not conform to my understanding of the law of fraud. I will not repeat what I said before, that they take a narrow view of the meaning of the fraud statute, which I do not think conforms to the present attitude of the court.

* * * * * * *

[fol. 1085] COURT'S CHARGE TO THE JURY

The Court: The law of the United States permits a judge to comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason that the jurors are the sole and exclusive judges of the facts in each case. However, it is not my [fol. 1086] custom to exercise this right. Nor shall I exercise it in the present case. I shall leave the determination of the facts in the case to you, satisfied as I am that you are fully capable of determining them without my aid. However, it is my duty under the law and my exclusive province, to instruct you as to the law that is applicable to the case, in order that you may render a general verdict upon the facts in the case, as determined by you, and the law as given you by me in these instructions. It would be a violation of your duty to attempt to determine the law or to base a verdict upon any other view of the law than that given you by the court—a wrong for which the parties would have no remedy because it is conclusively presumed by the court and all higher tribunals that you have acted in accordance with these instructions as you have been sworn to do.

During the course of the trial, I have, at various times, asked questions of certain witnesses, including the defendant. My object in so doing was to bring out, in greater detail, certain facts not yet fully testified to by the particular witness. You are not to infer from the questions I asked that I have any opinion as to the facts to which the question related. If, from those questions, you have made the inference that I have an opinion as to the particular facts to which the questions related, it is your right to treat it as an opinion, which you are at liberty to disregard [fol. 1087] in arriving at your own conclusion as to the particular facts or as to the other facts in the case.

You are here for the purpose of trying the issues of fact that are presented by the allegations in the Indictment and the plea of "Not Guilty", of the defendant thereto. This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice on account of the nature of the charge against him. You are to be governed, therefore, solely by the evidence introduced in this trial, and the law as given you by the court. The law will not

permit jurors to be governed by mere sentiment, conjecture, sympathy, passion or prejudice, public opinion, or public feeling. Both the public and defendant have a right to demand, and they do so demand and expect, that you will carefully and dispassionately weigh and consider the evidence and the law of the case and give to each your conscientious judgment; and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be.

The offense with which the defendant is charged is: Wilfully aiding, assisting and counseling preparation of false and fraudulent income tax returns, and forging or altering statements.

In this connection, you are instructed that the Indictment on file herein is a mere charge or accusation against the defendant, and is not any evidence of the defendant's [fol. 1088] guilt and no juror in this case should permit himself to be, to any extent, influenced against the defendant because or on account of such Indictment on file.

It is the duty of the jury to decide whether the defendant be guilty or not guilty of the offense charged, considering all the evidence submitted to you in the case.

The jury are the sole and exclusive judges of the effect and value of the evidence addressed to them and of the credibility of the witnesses who have testified in the case, and the character of the witnesses as shown by the evidence should be taken into consideration for the purpose of determining their credibility and the fact as to whether they have spoken the truth. And the jury may scrutinize not only the manner of witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified; his interest in the case, if any; or his bias or prejudice, if any, against any one or any of the parties; by the character of his testimony; or by evidence affecting his character for truth and honesty or integrity or by contradictory evidence; and the jury are the sole and exclusive judges of his credibility.

A witness may also be impeached by evidence that he made at other times, statements inconsistent with his present

[fol. 1089] testimony as to any matter material to the cause on trial.

A witness false in one part of his or her testimony is to be distrusted in others; that is to say, the jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; and the jury, being convinced that a witness has stated what was untrue, not as a result of mistake or inadvertence, but wilfully and with design to deceive, must treat all of his or her testimony with distrust and suspicion, and reject all unless they shall be convinced that notwithstanding the base character of the witness, that he or she has, in other particulars, sworn to the truth.

The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or to comport with some fact or facts otherwise known or established by the evidence.

You must not consider as evidence or law any statements, arguments, comments, or suggestions made by counsel during the trial. However, if counsel for either side have admitted or stipulated to the existence of any fact, you must consider it proved without further evidence.

You must not consider, for any purpose, any evidence offered or rejected, or which, after being received, has been stricken out by the court. You must decide the case solely upon the evidence before you and the inferences which you [fol. 1090] may deduce therefrom, as they are stated in these instructions and upon the law, as given you in these instructions.

A witness may also be impeached by evidence that he has been convicted of a felony or of an offense involving moral turpitude. In this case the defendant has admitted that he has been convicted of a felony. The fact goes only to his credibility, that is, the fact of conviction of another offense may lead you to the conclusion that his testimony is not to be believed. However, such conviction is not proof of guilt of the offense charged and you may not consider it for that purpose at all. If, notwithstanding such conviction, you believe that the testimony is credible and such testimony raises a reasonable doubt in your mind as to the guilt of the offense charged, he is entitled to an acquittal of the charge in this Indictment despite prior conviction.

You are instructed that the law does not require any defendant to prove his innocence, which, in many cases, might be impossible, but, on the contrary, the law requires the Government to establish his guilt and that by legal evidence and beyond a reasonable doubt.

The presumption of innocence with which the defendant is, at all times, clothed is not a mere form to be disregarded by you at pleasure, but that it is an essential substantial part of the law and binding on you in this case.

If you can reconcile the evidence before you upon any [fol. 1091] reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find the defendant not guilty.

A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, or from a want of sufficient evidence on behalf of the Government to convince you of the truth of the charge, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

Reasonable doubt is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

You are instructed that while the defendant in a criminal case is not required to take the stand and testify, yet if he [fol. 1092] does so, his credibility and the value and effect of his evidence are to be weighed and determined by the same rules as the credibility and effect and value of the evidence of any other witness is determined. If a defendant elects to take the stand and testify in his own behalf, his

testimony is to be weighed in the same manner and measured according to the same standard as the testimony of any other witness, and the tests for determining credibility of witnesses as given you, in another part of the instructions, are to be applied to his testimony alike with that of all other witnesses.

The Indictment, returned by a Grand Jury for the Southern District of California, is in 35 counts.

The statute under which Counts One through Eleven and Twenty-Three through Thirty-Five of the Indictment are brought is Section 7206(2), Internal Revenue Code of 1954, which, in pertinent part reads as follows:

> "Section 7206. Fraud and False Statements.
>
> "Any person who ——
>
> "(1) . . . .
>
> "(2) AID OR ASSISTANCE.—Wilfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the Internal Revenue laws, of a return, affidavit, claim or other document, which is fraudulent [fol. 1093] or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; . . ."

shall be guilty of an offense.

The statute under which Counts Twelve through Seventeen and Twenty-One and Twenty-Two are brought is 18 U.S.C., at 495, which provides that:

> "Whoever falsely makes, alters, forges or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or
>
> "Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

> "Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent [fol. 1094] to defraud the United States, knowing the same to be false, altered, forged, or counterfeited ——"

shall be guilty of an offense.

The statute under which counts Eighteen through Twenty are brought is 18 U.S.C., 1001, which states that:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry——"

shall be guilty of an offense.

The purpose of Section 7206(2), Internal Revenue Code of 1954, is to reach the advisors of taxpayers who prepare their returns and who might wish to keep down the taxes because of the credit they would get with their principals.

You are instructed that wilfully and knowingly aiding and assisting, and counseling, procuring and advising the preparation and presentation of a false return for one taxpayer is a separate offense from wilfully and knowingly aiding and assisting, and counseling, procuring and ad- [fol. 1095] vising the prearation and presentation of a false return for another taxpayer. The Indictment in this case, therefore, charged separate offenses in each of Counts One through Eleven and Twenty-Three through Thirty-Five.

The elements of the offense charged in Counts One through Eleven and Twenty-Three through Thirty-Five of the Indictment are as follows:

1. That the defendant aided, or assisted in, or procured, or counseled, or advised the preparation, or the presentation, of the income tax return there described;
2. That the said income tax return was false or fraudulent; and
3. That the act of the defendant was wilfully done.

You will note that the Government is not required to prove that the defendant did all of the following acts, that is, that he aided and assisted in, and procured, and counseled, and advised the preparation, or the presentation, of the described income tax return, but only that he did one of those acts. Similarly, the act of the defendant so proven must relate to either the preparation or the presentation of the described income tax return, but it is not necessary that the Government prove that the defendant participated in both the preparation and the presentation of the income tax return in question.

[fol. 1096] In every criminal offense there must be concurrence of act and intent. This is especially true in an offense like the present one which requires that the act shall be done knowingly and wilfully.

This intent is a material element of the offense which, like all others, must be proved beyond a reasonable doubt.

In determining the question, you are to consider all the facts and circumstances in the case which touch the conduct of the defendant, as well as the declarations or admissions, if any.

Criminal intent may be implied from the acts, conduct, declarations or admissions of the defendant. Such acts, conduct, declarations and admissions, as shown by the evidence considered in relation to the charge made, may establish criminal intent beyond a reasonable doubt.

You will note that under the several counts of the Indictment the acts are alleged to have been done knowingly and unlawfully.

The word "knowingly", when applied to an act or thing done, imports knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such act or thing.

The word "unlawfully", as used in the Indictment, means that the act which is so characterized, proceeded from a criminal intent and evil purpose.

They import knowledge of the act or thing so done, as [fol. 1097] well as an evil intent or bad purpose in doing such act. They exclude all color of right and excuse for the act.

If any person prepares an income tax return for another person, it is necessary that the person so preparing the return execute the prescribed form of verification on the re-

turn. Such verification is required on all such income tax returns unless the actual preparation of the return is a regular and usual incident of the employment of one regularly and continuously employed for full time by the person for whom the return is made.

You will recall that Section 7206(2), Internal Revenue Code of 1954, which I have previously read to you, provides that a person may be guilty of the offense of assisting in the preparation of a false or fraudulent return whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return. Therefore, it is immaterial whether the taxpayers named in the Indictment participated in, were aware of, or, on the other hand, were wholly without knowledge of, or responsible for, the particular entries upon their tax returns which have been called into question by the evidence introduced by the Government.

It is not necessary that the Government prove that the total deductions that the taxpayers named in the Indictment were entitled to claim were in the particular sums there [fol. 1098] alleged, but as to each of Counts One through Eleven of the Indictment proof must be made that the return there described was false or fraudulent in that deductions to which the taxpayer, or taxpayers, named therein were entitled were overstated in a substantial amount.

That the Government may have discovered the falsity of an income tax return and may have been able by reason of that discovery to avoid a monetary loss is no defense to the charges contained in the Indictment.

It is immaterial whether or not the taxpayer was actually successful in obtaining a refund or any benefit as a result of the filing of a false tax return.

The first step in arriving at the taxable net income of an individual is a determination of his gross income. Gross income is generally all salaries, wages, gains or profits and income derived from any source whatever.

After having determined the gross income of an individual, the next step is to arrive at adjusted gross income, which is gross income minus certain allowable deductions, of which I will specifically instruct you as they are pertinent to this case.

The term "deduction" means any item allowed by law

to be subtracted from gross income in computing the amount of net income.

Under the law, the expenses, liabilities, or deficit of [fol. 1099] one year cannot be used to reduce the income of a subsequent year. A taxpayer has the right to deduct all authorized allowances, but if he does not within any year deduct certain of his expenses, losses, interest, taxes, or other charges, he cannot deduct them from the income of the next or any succeeding year.

A deduction is allowed by law for such charitable contributions as are actually paid by the taxpayer during the taxable year to religious, charitable, educational and similar non-profit organizations.

Where a tax account represents a taxpayer in the preparation of tax returns, there is no presumption of authority and the rights of the tax accountant must be governed by the terms of his employment, as applies to any other ordinary agency.

Also, a power of attorney to prosecute a claim against the Government giving authority to receive a check in payment gives the agent no power to endorse and collect the check. But such authority may be given either orally or by writing.

For your assistance, the clerk has prepared a form of verdict which reads as follows, omitting the title of court and cause:

> "We the Jury in the above-entitled cause find the [fol. 1100] defendant, R. Milo Gilbert, "blank," as charged in Count 1 of the Indictment; . . ."

then the following blank spaces—I shall not take the time to read them as to each count.

If you find the defendant guilty, you have to insert that word opposite the count as to which you find him guilty. If you find him not guilty, you insert those words.

While you are required to render a verdict on all counts, unless for some sufficient reason the court allows you to bring in a verdict on less than all, it is not necessary that your verdict be the same on all counts. It all depends on you. You may find the defendant guilty of some counts and not guilty as to others, as the evidence convinces you either of his guilt or his innocence. You may find the defendant

not guilty on all counts. In other words, what I want to impress upon you is there is no required consistency. You cannot render a general verdict because of the large number of counts. You must insert the exact verdict. There is a possibility of arriving at one verdict on one count and another on another count. I merely want to impress upon you that it is your privilege to determine as to each count what your verdict is going to be.

When your verdict has been arrived at, the form should be dated and signed by the foreman and returned to the court.

I think you have already been told that in the federal [fol. 1101] courts the jury is known as a common law jury; therefore, all of you must agree as to each count on which you return a verdict before a verdict can be returned.

Are there any objections to the instructions given? If so, opportunity will be given to present them outside the hearing of the jury.

Mr. Dorn: I have no objection, your Honor.

(Whereupon, the following proceedings were had at the bench, in the presence but out of the hearing of the jury:)

The Court: In view of the fact that I have rejected three instructions and in view of the fact that I divide the process of objections into two parts, some judges combine them, just for your sake and for the record, I think you should object here to my refusal to give the instructions and state your grounds.

Mr. Dorn: The defendant objects to the refusal of the court to give the defendant's offered instructions 1, 2 and 3 on the ground that the offered instructions state the correct view of the law in regard to the offenses contained in the Indictment.

If the court please, there is also objection to a statement of the court on the question of the taxpayer taking advantage of a loss incurred one year on another, which I do not believe is a correct statement of the law.

The Court: Losses are deductible if subsequent losses [fol. 1102] occur. That is why I had the man explain what he meant by "carry-back" and "carry-forward".

Mr. Dorn: I believe there is an instruction which states if a man fails to deduct a loss in one year, he can't take advantage of that in any subsequent year. I think the law

is that the loss can be carried forward to a subsequent year so he can take advantage of it.

Mr. Hornbaker: I thought he read it in terms of the deduction.

The Court: We are talking about deductions, not losses. I checked that very carefully at the time it was presented by the Government.

Mr. Dorn: This was one that was offered by the Government.

The Court: No. 18.

Mr. Dorn: It says:

> "Under the law, the expenses, liabilities, or deficit of one year cannot be used to reduce the income of a subsequent year."

I think that is not the law.

The Court: I did not give that.

Mr. Dorn: I think you did, your Honor.

The Court: Well, I think I should have eliminated "losses". I think I will deduct that because that might conflict. I will reword it:

> [fol. 1103] "Under the law, the expenses, liabilities of one year cannot be used to reduce the income of a subsequent year. A taxpayer has the right to deduct all authorized allowances, but if he does within any year deduct certain of his expenses, interest, taxes, or other charges, he cannot deduct them from the income of the next or any subsequent year."

Mr. Dorn: Well, then might something be said in that instruction about a carry-back or carry-forward loss? I think there was some mention of it in the case.

The Court: We did. It was an abstract thing; nobody claimed it.

This is the best I can do:

> "As to losses being carried back or forward, the law permits it to be done to the extent of the taxes paid in a particular year."

Mr. Dorn: Yes, your Honor.

The Court: This is agreeable now to you to read it to the jury?

Mr. Dorn: Yes, your Honor.

The Court: I will eliminate the word "losses." I didn't catch it before.

(Whereupon, the following proceedings were had in open court, in the presence and hearing of the jury:)

[fol. 1104] The Court: Ladies and gentlemen of the jury, the American system is based upon the idea that even judges are fallible—thank God! When it comes to instructions, counsel are given the opportunity at the conclusion of the instructions to indicate to the court any objections they have to an instruction they asked for and I refused or as to some instruction which I gave, or to the language of an instruction; the object being to allow the judge to correct any misapprehension that may have arisen from the instruction as given.

As a result of a conference, and because it was thought that reference to the word "loss" might be misunderstood in view of the testimony given by Mr. Gilbert, which no one disputes as to the meaning of how you carry back and carry forward a loss of a particular year against the tax of the previous year, I have decided to modify the instruction. Instead of the instruction heretofore given on the subject, I will give this one, and while you deliberate, I will have this copied:

> "Under the law, the expenses, liabilities of one year cannot be used to reduce the income of a subsequent year. A taxpayer has the right to deduct all authorized allowances, but if he does within any year deduct certain of his expenses, interest, taxes, or other charges, he cannot deduct them from the income of the next [fol. 1105]or any subsequent year.
>
> "As to losses being carried back or forward the law permits it to be done to the extent of the taxes paid in a particular year."

Mr. Harden, the jury are about to retire and it becomes my duty to excuse you from further participation in the case. I want to thank you for your presence and remind you that you are bound by the same rule of secrecy. You are

not to discuss the merits of the case with anyone. If, after the verdict has been announced, when you see your fellow jurors on the next panel and you want to talk to them, or you can call them up at home to find out what the verdict was, but you are bound to the same rule of secrecy. You may withdraw from the courtroom.

(Alternate Juror Bruce Harden was excused.)

Juror Davidson: Would it be permissible, your Honor, to ask you to define a word?

The Court: Yes.

Juror Davidson: The word "trustee", your Honor, as there as so many ways of using it.

The Court: Get me the dictionary.

(Whereupon, the following proceedings were had at the bench, in the presence but out of the hearing of the jury:)

The Court: The definition of "trustee" in Ballantyne's Dictionary is:

[fol. 1106] "One in whom property is vested in trust for others."

Mr. Hornbaker: That is acceptable.

The Court: Would you read Webster's definition for me where it says "Law in U.S."?

The Clerk: "One in whose hands the effects of another are attached by the trustee process."

The Court: No, where it says "Law." Let me get it.

The Clerk: "A person, whether real or juristic, to whom property is legally committed in trust: one entrusted with property for another."

Mr. Dorn: I think Ballantyne's would be acceptable, your Honor.

Mr. Hornbaker: Why don't you give them both?

The Clerk: There is one in Oxford, if you want it, your Honor.

The Court: Why don't we use this very short one:

"One entrusted with the property of another."

Mr. Dorn: I think that is sufficient, your Honor.

The Court: "One entrusted legally with the property of another."

Mr. Dorn: I object to the word "legally", your Honor. I don't think it has to be a legal trust to constitute a trust. I think the word "legal" might be misinterpreted by the jury.

[fols. 1107-1123] Mr. Hornbaker: It is all right with me, your Honor.

The Court: How about this one:

"One entrusted with the property of another?"

Do you both agree on this?

Mr. Dorn: Yes, your Honor.

Mr. Hornbaker: Yes, your Honor.

(Whereupon, the following proceedings were had in open court, in the presence and hearing of the jury:)

The Court: Ladies and gentlement, one of the beauties of a dictionary is that it enables us to define words. Many a time it is hard to define a simple word. Counsel have agreed that I shall give you this very simple definition of "trustee":

"Trustee—One entrusted with the property of another."

I will have this written on a piece of paper, as well as the other instructions which I have changed.

Ladies and gentlemen, your first duty upon retirement to the jury room is to select one of you as a foreman. I have already explained to you the form of verdict and you are privileged to render it.

The clerk will now swear the bailiff and the matron.

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[fols. 1124-1152] In United States District Court

Transcript of Proceedings

Los Angeles, California, Friday, January 22, 1960, 2 p.m.

The Court: Ex parte matters?

The Clerk: Nothing, your Honor.

The Court: We will hear the calendar matter.

The Clerk: No. 27,865-Criminal, U.S.A. vs. R. Milo Gilbert, for hearing (1) defendant's motion for new trial, (2) defendant's motion for judgment of acquittal notwithstanding the verdict, (3) hearing on pre-sentence report and sentencing upon verdict of guilty as to counts 4 to 34 inclusive.

Case No. 27,646-Criminal, U.S.A. vs. R. Milo Gilbert for disposition.

The Court: All right. I will hear counsel for the defendant. I will hear the first two motions. I presume they go together and probably involve the same principles.

Mr. Dorn: Yes.

. . . . . .

[fols. 1153-1163e] Denial of Motion for a New Trial and Motion for a Directed Verdict

The Court: I do not think there is any error committed in the case that would warrant the court granting a new trial or judgment of acquittal notwithstanding the verdict, and therefore the motion for a new trial will be denied and the motion for a directed verdict will also be denied. I am ready to proceed with the sentence now.

. . . . . .

[fol. 1164] IN UNITED STATES DISTRICT COURT

Case No. 27865-Crim

USA

vs.

R. MILO GILBERT

Plaintiff Exhibit 31

Date — No. — Identification.
Date 11/13/59 No. 31 In Evidence.
L. Cunliffe, Clerk, U. S. District Court, Sou. Dist of Calif.
——, Deputy Clerk.

[fol. 1165] In United States District Court

Case No. 27865-Crim

USA

vs.

R. Milo Gilbert

Plaintiff Exhibit 32

Date — No. — Identification.
Date 11/13/59 No. 32 In Evidence.
L. Cunliffe Clerk. U. S. District Court, Sou. Dist. of Calif.

——, ——, Deputy Clerk.

[fol. 1166] In United States District Court

17034

Case No. 27865-Crim

U.S.A.

vs.

Milo Gilbert

Petitioner Exhibit 33

Date Nov. 13, 1959 No. 33 Identification.
Date— No. — In Evidence.
——, ——, Clerk, U.S. District Court, Sou. Dist. of Calif.
L. Cunliffe, Deputy Clerk.

[fol. 1173] IN UNITED STATES DISTRICT COURT

17034

Case No. 27865-Crim

U.S.A.

vs.

MILO GILBERT

Petitioner Exhibit 34

Date Nov. 13, 1959 No. 34 Identification.
Date — No. — In Evidence.
——, ——, Clerk, U.S. District Court, Sou. Dist. of Calif.
L. Cunliffe, Deputy Clerk.

[fol. 1179] In United States District Court

17034

Case No. 27865-Crim

U.S.A.

vs.

Milo Gilbert

Defendant Exhibit M

Date Nov. 13, 1959 No. M Identification.
Date Nov. 13, 1959 No. M In Evidence.
——, ——, Clerk, U.S. District Court, Sou. Dist. of Calif.
L. Cunliffe, Deputy Clerk.

[fol. 1179a] POWER OF ATTORNEY

Special

KNOW ALL MEN BY THESE PRESENTS: That we, Daniel H. Bartfield and Charlene R. Bartfield, (husband and wife), the undersigned (jointly and severally if more than one), hereby makes, constitutes and appoints R. Milo Gilbert his true and lawful attorney for him and in his name, place and stead and for his use and benefit:

(a) For all matters pertaining to our Federal and California State Income Taxes and Tax Returns for the Calendar years 1954 to 1957 inclusive. This includes the filing and signing of Tax Returns and all other necessary forms, such as extension of time, etc., and the filing of necessary refund claims; and the receiving, depositing, endorsing and otherwise negotiating such refund checks at his sole discretion, including the right of offset. Furthermore, to make any compromises and settlements at his sole discretion, as he see fit and proper. Furthermore, to perform any further act as he may deem necessary under the circumstances.

We further agree to hold said R. Milo Gilbert harmless for any and all acts committed.

GIVING AND GRANTING unto his said attorney full power and authority to do and perform all and every act and thing whatsoever requisite, necessary, or appropriate to be done in and about the premises as fully to all intents and purposes as he might or could do if personally present, hereby ratifying all that his said attorney shall lawfully do or cause to be done by virtue of these presents.

Wherever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

Witness his hand this 10th day of April, 1957.
Daniel H. Bartfield
Charline R. Bartfield

STATE OF CALIFORNIA,
County of Los Angeles, ss:

On April 10, 1957 before me, the undersigned, a Notary Public in and for said County and State, personally appeared Daniel H. Bartfield and Charline R. Bartfield known to me to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same.

Witness my hand and official seal.

(Seal) Ruth Gilbert

Notary Public in and for said County and State

Ruth Gilbert, Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires September 22, 1958.

When Recorded Mail To:

R. Milo Gilbert, 2747 North Lincoln St., Burbank, Calif.
Space Below for Recorder's use Only
Title Order No.
Escrow or Loan No.—

This standard from covers most usual problems in the field indicated. Before you sign, read it, fill in all blanks, and make changes proper to your transaction. Consult a lawyer if you doubt the form's fitness for your purpose.

[fol. 1180] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17,034

R. MILO GILBERT, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Southern District of California, Central Division

OPINION—March 30, 1961

Before: Barnes, Hamley and Hamlin, Circuit Judges.

BARNES, Circuit Judge:

A complaint, charging forgery (18 U.S.C. § 495) of a certain check (United States Treasury check number 11,260,576, dated June 2, 1958, in the amount of $848.11) was filed before a United States Commissioner on January 2, 1959. On the same day a warrant for the arrest of the appellant was issued,[1] requiring appellant to answer the [fol. 1181] complaint relating to the forgery of the one check described above.

Appellant was an accountant specializing in preparing income tax returns for clients and in advising his clients concerning their form, the inclusions, and the deductions. There is little doubt, from an examination of the record, that appellant was pursuing a steady plan of falsifying his clients' returns by adding income tax deductions not in-

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[1] The warrant read as follows:

"Warrant of Arrest

"To Any U. S. Marshal or other authorized officer

You are hereby commanded to arrest R. Milo Gilbert
(name of defendant)

and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with Forgery of a United States Treasury check in the

curred or claimed by them to their returns after they had signed them, requesting a refund from the government in the clients' names, and pocketing the same, allegedly by forging a client's name, *i.e.*, cashing the government checks by endorsing the checks as trustee for the payees, which he was not, either in fact or law. For the purpose of this part of this opinion, we find there was more than sufficient evidence to support appellant's conviction on each of the 35 counts of which he was indicted, if all such evidence were properly admissible.

Count 21 is the sole count relating to the check numbered 11,260,576, dated June 2, 1958, in the amount of $848.11, payable to Daniel H. and Chalrene (sic) R Bartfield—the check mentioned in the warrant issued January 2, 1959.

Count 22 relates to another check in the amount of $556.04 payable to the same payees, Mr. and Mrs. Bartfield.

All the other 33 counts relate to returns of, refund demands for, or checks payable to, other and different clients.

Hirst, the Special Agent of the United States Secret Service, who had filed the complaint and obtained the warrant, proceeded to serve it. He went to appellant's combined home and office, arrested him,[2] stated he wanted "the

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amount of $848.11 (here describe offense charged in complaint) in violation of U.S.C. Title, 18, Section 495

Date January 2, 1959. s Theodore Hocke,
United States Commissioner.

"1. Here insert designation of officer to whom warrant is issued.

Return

"Received Jan 5, 1959 at Los Angeles, and executed by arrest of R. Milo Gilbert at Los Angeles Calif on Jan 5, 1959.

s/ Robert W. Ware, (Name.) U.S. Marshal, (Title). So. District of California. By s/ Fred L(?) Sharpley, Deputy"

Date January 5, 1959.

[2] Appellant urges this was a "purported arrest" because the return shows the date of arrest as January 5th, 1959 (the date of the return). The return was obviously in error.

tax records of defendant and his clients." Appellant [fol. 1182] produced the records, and invited inspection of others in the garage, according to government witnesses. Appellant states he was threatened the search would be made by force, if necessary, and if he did not turn over his records, and after talking to his attorney, appellant "did not restrain the government officers further."[3]

Appellant describes that which the government agents seized as "thousands of documents." The motion filed for the return of seized property referred to "files" containing papers and references relating to one hundred and eighty five single persons, married couples, partnerships or corporations; an unspecified number of tax control sheets covering an eight year period, seven powers of attorney, one ledger book, four boxes or envelopes containing records, and five categories of groups of personal records, bills, checks, clients' work sheets, and miscellaneous clients' letters, notes and memos—in all some two hundred and three items. Some thirty-four of such items were returned by the government, the balance were retained.

On May 13, 1959, a twenty-two count indictment was filed against appellant; and later, on August 5, 1959, the super-

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but the error in the return cannot effect the true facts as to the date of arrest, where no party or counsel has been misled or deceived. Nor can an error in a ministerial act void the warrant (cf. Evans v. United States, 6 Cir., 1957, 242 F.2d 534, 536, cert. denied 353 U.S. 976), even if there is a complete failure to make any return. Rose v. United States, 6 Cir., 1921, 274 Fed. 245, 250. The case was tried below on the theory the arrest on January 2, 1959, was lawful. Appellant's counsel stated: "I do not deny that the arrest was anything but lawful."

[3] We agree with appellant that the trial court, having suppressed part of the papers seized, impliedly found no consent by defendant to the search. That would not prevent this court from considering such an issue. We find a disputed question of fact determined by the trial court as a lack of consent, and we do not find a sufficient showing to enable us to hold such implied finding clearly erroneous. Fed R. Crim. P. 526.

seding thirty-five count indictment hereinabove described was filed.

Appellant, prior to trial filed a timely motion for the return of the seized property and for the suppression of all evidence obtained by such search and seizure.

This motion to suppress "was granted as to all files except those relating to the four checks," as set forth in Counts 12, 13, 14, 15, 16, 17, 21 and 22, and denied as to such files. These unaffected counts related to the following nine checks, described by the year of issue, check number and client, as follows:

[fol. 1183]

Count No.	Year	Check No.	Client
12	1957	10,643,497	James J. Manion
13	1957	10,685,637	Marion Manion
14	1957	10,707,063	" "
15	1957	10,730,575	James J. Manion
16	1957	10,768,977	N. and T. Libling
17	1957	12,054,960	Dolores J. Frankel
18	1957	12,054,961	Fay Matorian [4]
21	1958	11,260,576	Daniel H. and Chalrene Bartfield
22	1958	11,260,577	Daniel H. and Chalrene Bartfield

The counts charged either forgery of the checks (18 U.S.C. § 495) or wilfully presenting a forged check to an agency of the United States with intent to defraud (18 U.S.C. § 1001):

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[4] By formal order thereafter made, the files relating to Fay Matorian and additional files relating to James J. and Marion Manion were not suppressed. Count 18 involved check number 12,054,961, dated in 1957, payable to Fay Matorian. This first had been included in the court's oral decision as to what should not be suppressed, but had been omittted from the clerk's minute order.

The counts involving the Manions were 8, 9, 10 and 11, covering returns for the husband and wife in the years 1955 and 1956.

or aiding or advising the filing of a fraudulent return (26 U.S.C. § 7206(2)).

Appellant was tried on all thirty-five counts. The jury acquitted appellant on Counts 1, 2, 3 and 35, and found appellant guilty of Counts 4 to 34, inclusive. Appellant was sentenced to thirty-one consecutive sentences of one year and one day on each of Counts 4 to 34, inclusive.

One further factual matter requires recital. Appellant had been under investigation by the government taxing authorities during most of 1958, and had refused to cooperate with government investigators by turning over "all of his files and records" after their alleged request therefor. Appellant testified that Special Agent Hirst telephoned appellant in December 1958, but no contact between them was then made; that agent Hirst again telephoned appellant on January 2, 1959, about 2:00 P.M.; that appellant first offered to come to Hirst's office, subsequently to meet Hirst at a public restaurant; that Hirst insisted on meeting appel- [fol. 1184] lant at his home; that agent Hirst, and agent Coyne then arrived at appellant's home about 4:30 P.M., and arrested appellant; that two other agents, Borchardt and Lewis, arrived almost immediately thereafter, and participated in the search. This factual sequence, says appellant, proves that the government officers were trying to maneuver the arrest of appellant so that it would take place physically at a place where they could search appellant's files, as an incident to his arrest, without a search warrant, and as extensively as they desired.

On this appeal the appellant makes no objection to the introduction of evidence obtained by the search and seizure with respect to the conviction on Counts 21 and 22, relating to the Bartfield checks. One of these checks was the subject of the original warrant for appellant's arrest on the charge of forgery. But appellant urges error in the appellant's conviction on the twenty-nine other counts, charging (a) that the evidence relating to eleven counts (Counts 8 to 18, inclusive) offered by the government (and which was not suppressed by the trial court's suppression order) had been obtained illegally from files relating to *other crimes*, *i.e.*, other forgeries or false claims. (The trial court took the position these files were all *instrumentalities* of the crime of forgery.) (b) That the evidence relating to eigh-

teen counts (Counts 4 to 7, inclusive, 19, 20, and 23 to 34, inclusive) offered by the government (although such files had been returned to appellant by the lower court's order) had been obtained illegally, or leads as to further proof of such counts had been obtained illegally, from those files during the time the government had maintained possession of them. These counts, relating to the following persons for the respective years cited, were:

[fol. 1185]

Count	Client	Years Covered by Return
4	Louis Dunoff	1956
5	Beatrice Dunoff	1956
6	Bernard Arond	1956
7	Mollie Arond	1956
19	Sam Matorian	1957
20	Allen Frankel	1957
23	Juventino Silva	1956
24	Celia Sally Silva	1956
25	Juventino Silva	1957
26	Celia Sally Silva	1957
27	Juventino Silva	1958
28	Celia Sally Silva	1958
29	Raul Anchondo	1956
30	Angelo Anchondo	1956
31	Raul Anchondo	1957
32	Angelo Anchondo	1957
33	Raul Anchondo	1958
34	Angelo Anchondo	1958

Counts 8 to 11, relating to the Manions, are based on alleged false returns. Exhibits 19 and 22 were offered in evidence to support such charge. Exhibit 19 consisted of notes, in Mr. Manion's handwriting, and prepared by him, showing his 1955 income and expenses as a public relations consultant, and his wife's 1955 income and expenses as a consultant for "Relaxicisor." This had been sent through the mail to appellant and was the basis, as such figures were falsified and increased by appellant, of the false 1955 income tax returns for Mr. and Mrs. Manion. Exhibit 22 consisted of similar material, in Mr. Manion's handwriting,

and prepared by him, similarly sent to Mr. Gilbert, and similarly used by appellant to prepare Mr. and Mrs. Manion's 1956 income tax returns with fictitious and fraudulent increased figures for deductions.

Objection was made to Exhibits 19 and 22 upon the ground the documents had been illegally seized by means of an illegal search. The objection was overruled upon the ground the documents did not belong to defendant Gilbert, and hence Gilbert was not in a position to object to their seizure. [fol. 1186] During the trial defendant's counsel objected to the admission of crucial evidence in support of any and all counts, other than those relating to the Bartfields (Counts 21 and 22), upon the ground the evidence was obtained as a result of material gathered by an illegal search and seizure. This so-called "fruit of a poisoned tree" doctrine appellant urges with great vehemence. *United States* v. *Alberti*, S.D.N.Y., 1954, 120 F.Supp. 171. This point was kept alive by a motion to dismiss at the conclusion of the government's case. An offer was made by appellant's counsel to prove that all evidence (save as to Counts 21 and 22) was obtained by the government as a result of material gathered by and in the alleged illegal search and seizure of January 2, 1959. The government countered by an offer to prove none of it had; that the tax officials had "pulled . . . all of the returns which Mr. Gilbert prepared" and that such returns were under inspection long before January 2, 1959. The court ruled this was a collateral issue, neither side produced evidence, and the defendant's objection upon the ground of an illegal search was overruled. A motion was made at the conclusion of all evidence that the jury be directed to return a verdict for the defendant, upon similar grounds. After verdict and before sentence, a motion for a judgment notwithstanding the verdict, and for a new trial was made on similar grounds. Each was denied. Thus appellant's first point has been preserved throughout the trial, unless he had to object to every question or establish a running objection in the record. We assume he was not so required.

In addition to appellant's principal point with respect to the alleged illegal search and seizure, and the resultant "fruit of a poisoned tree" doctrine, appellant urges, secondly, that Exhibits 19 and 22 (the Manion material hereinabove referred to) were improperly admitted; thirdly,

that endorsement by appellant of various checks "as Trustee" does not constitute a forgery.

Appellant also urges (as his fourth point) errors in the introduction of evidence concerning the false and fraudulent returns, with respect to the alleged forgeries of checks, or with respect to the alleged false and fraudulent statements inducing payments (Counts 12 through 22). No authority is cited in support of this position, and appellant did not protect his record on this issue throughout the trial. We therefore will not pass upon it. *Frazier* v. *David*, 1922, 187 [fol. 1187] Cal. 724, 5 V.J.S. 342; *Shell Petroleum Corp* v. *Scully*, 5 Cir., 1934, 71 F. 2d 772.

As his fifth point, appellant urges the insufficiency of the evidence to support the verdicts as to Counts 21 and 22. We cannot agree. We are asked to assume the unnotarized signatures of the Bartfields' powers of attorney delivered to the appellant were sufficient as between the Bartfields and Gilbert to authorize the latter to endorse checks as a Trustee. This might enable a third person to recover from the Bartfields because they had placed in Gilbert's hands the power to act in a fraudulent manner, but such signing of the power of attorney did not authorize Gilbert to sign the government's checks which were the basis of Counts 21 and 22 on behalf of the Bartfields. Such authority to Gilbert was specifically denied by both Mr. Bartfield and Mrs. Bartfield. Appellant was never their Trustee, nor had they ever represented to any one he was. Unless their conduct had harmed an innocent third party, Gilbert was not a Trustee for the purpose here under consideration.

Appellant signed the checks referred to in Counts 21 and 22 with the name of the taxpayers, "by R. Milo Gilbert, trustee." This was a status he did not have. He had a limited power to file a return, and to receive refunds, but not to realize them. The signature, in the Trustee capacity, was of a fictitious name and was a forgery. *Rowley* v. *United States*, 8 Cir., 1951, 191 F. 2d 949; *Milton* v. *United States*, D.C.Cir., 1940, 110 F. 2d 556.

The jury was correctly instructed that a written power of attorney to prosecute a claim against the government and giving authority to an agent to *receive* a check, gives that agent no power to *endorse* and *collect* the check. Such authority may be given either orally or in writing. *Cignetti*

v. *American Trust Co.*, 1956, 139 Cal. App. 2d. 744, 294 P. 2d 490; *Burnstein* v. *Sullivan*, 1909, 134 App. Div. 623, 119 N.Y.S. 317. Tiffany, Agency, 82 (2d ed.).

There being no adequate or convincing proof of such authority in writing, appellant must rest on an oral authority to sign as Trustee, and realize upon the checks. Appellant claims he had this. Such authority was denied by both Bartfields. At best this presents a question of credibility, decided adversely to appellant below, and this [fol. 1188] evidence must be looked upon by us, on this appeal, in the light most favorable to support the government's case here. *Campodonico* v. *United States*, 9 Cir., 1955, 222 F. 2d 310. When this is done, there is beyond question substantial evidence to support the conviction of appellant on Counts 21 and 22.

We go back again to appellant's first point, the alleged illegal search and seizure. We must determine the extent of a search that may properly be made without a search warrant, following a lawful arrest for a crime. The Fourth Amendment declares:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

In 1959 the Supreme Court stated its decisions on this subject "cannot be satisfactorily reconciled"—that "the problem has provoked strong and fluctuating differences of views on the Court."[5]

That same decision also tells us the *Harris*[6] and *Rabinowitz*[7] cases set "by far the most permissive limits upon searches incidental to lawful arrests."

We first must determine whether any search (without considering its extent) was proper, *i.e.*, lawful. One was,

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[5] Able v. United States, 1960, 362 U.S. 217, 235.

[6] Harris v. United States, 1947, 331 U.S. 145.

[7] United States v. Rabinowitz, 1950, 339 U.S. 56.

as incidental to an admittedly lawful arrest. We have here no evidence of an unlawful entry into premises.[8] There was no forced entry.[9] There was no entry by subterfuge.[10] There had been no previous unauthorized entry.[11] Neither had there been an abandonment of the [fol. 1189] records sought.[12] And no felony was being committed in the officers' presence at the time of arrest.[13]

We then reach the question, did the search extend beyond the area of reasonableness, *i.e.*, was the search made within the limited permissible bounds incident to a lawful arrest? It is, of course, patent that only unreasonable searches are prohibited by the Fourth Amendment.[14] The right to search the person after a valid arrest "has always been recognized in this country and in England." [15] How much further may the search go?

> "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case." *United States* v. *Rabinowitz*, *supra* at 63, citing *Go-Bart Co.* v. *United States*, 282 U.S. 344, 357.

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[8] Gouled v. United States, 1921, 255 U.S. 298.

[9] Miller v. United States, 1958, 357 U.S. 301; Gatewood v. United States, D.C. Cir., 1953, 209 F. 2d 789; United States v. Bowman, D.D.C., 1956, 137 F. Supp. 385.

[10] Leahy v. United States, 9 Cir., 1959, 272 F. 2d 487, 489, writ of cert. dismissed, 364 U.S. 945.

[11] United States v. Alberti, S.D.N.Y., 1954, 120 F. Supp. 171 (point not reached).

[12] Hester v. United States, 1924, 265 U.S. 57, 58; Abel v. United States, supra at 241.

[13] Harris v. United States, supra at 155.

[14] United States v. Rabinowitz, supra at 60; Carroll v. United States, 1925, 267 U.S. 132, 147.

[15] United States v. Rabinowitz, supra at 60; Weeks v. United States, 1914, 232 U.S. 383, 392.

We first examine the circumstances in cases where the particular search has been upheld. There is no question but that in addition to the search of the person of one who is arrested, the arresting officers may:

> "... search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed ... [T]he premises where the arrest was made, which premises were under the control of the person arrested and where the crime was being committed, were subject to search without a search warrant. Such a search ... [is] not 'unreasonable.' "[16] *Id.* at 61.

[fol. 1190] In *Marron* v. *United States*, 1927, 275 U.S. 192, the search for liquor described in the warrant uncovered a certain ledger and invoices pertaining to the liquor business. These were held validly seized only *because the arrest was for an offense committed in the presence of the invading officers.* And the area of permissible search extends to all parts of the premises used for the unlawful purpose *then taking place.*

Officers are not limited to a search in the one room where the arrest takes place. *Harris* v. *United States*, 1946, 331 U.S. 145 at 152. There a search of a four-room apartment was upheld. In the *Harris* case, the facts are in general quite similar to the instant case. There two valid warrants of arrest were issued. One charged violation of a Mail Fraud Statute, in the mailing of a forged $25,000 check. The second charged transportation of a forged $25,000 check in interstate commerce with intent to defraud. The search was to find two $10,000 *legitimate* cancelled checks, thought to have been used in effecting the forgery. In addition, "the search was said to be for the purpose of locating 'any means that might have been used to commit these two crimes such as burglar tools, pens, or anything that could

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[16] Citing Agnello v. United States, 1925, 269 U.S. 20, 30; Carroll v. United States, supra at 158; Boyd v. United States, 1886, 116 U.S. 616, 623-24.

be used in a confidence game of this type."[17] The arrest took place in the living room, and it, a bedroom, a bathroom and a kitchen were each carefully searched. In a bedroom bureau drawer a sealed envelope was found and within it, eight "Notice of Classification" cards and eleven "Registration Certificates," bearing the stamp of Local Board No. 7 of Oklahoma County, all being papers relating to the National Selective Training or Service Act of 1940. The defendant was charged in sixteen counts of unlawful possession, concealment and alteration of such cards. The evidence from the envelope was that upon which defendant's conviction was based, and against which a motion to suppress was directed. It was conceded "that the evidence is in no way related to the crimes for which petitioner was initially arrested,"[18] and that the search was made without a search warrant.

[fol. 1191] The district court denied the motion to suppress without opinion. The court of appeals affirmed, finding the search was conducted in good faith, "that it was not a general exploratory search for merely evidentiary materials, and that the search and seizure were a reasonable incident to petitioner's arrest."[19]

The Supreme Court, after saying what the *Harris* search was not, then said:

> "Nor is this a case in which law-enforcement officers have entered premises ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search for merely evidentiary materials tending to connect the accused with some crime. *Go-Bart Company* v. *United States*, *supra*; *United States* v. *Lefkowitz*, *supra*. In the present case the agents were in possession of facts indicat-

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[17] This quotation is from Harris v. United States, supra at 148-149. The inside quotation apparently was taken from the oral testimony of one or more of five Federal Bureau of Investigation Agents who made the arrest and search. See note 8, p. 149, Harris v. United States, supra.

[18] Id. at 149.

[19] Id. at 150.

ing petitioner's probable guilt of the crimes for which the warrants of arrest were issued. The search was not a general exploration but was specifically directed to the means and instrumentalities by which the crimes charged had been committed, particularly the two canceled checks of the Mudge Oil Company. The Circuit Court of Appeals found and the District Court acted on the assumption that the agents conducted their search in good faith for the purpose of discovering the objects specified. That determination is supported by the record. The two canceled checks were stolen from the offices of the Mudge Oil Company. There was evidence connecting petitioner with that theft. The search which followed the arrest was appropriate for the discovery of such objects. Nothing in the agents' conduct was inconsistent with their declared purpose.

"Furthermore, the objects sought for and those actually discovered were properly subject to seizure. This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of [fol. 1192] crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime. Clearly the checks and other means and instrumentalities of the crimes charged in the warrants toward which the search was directed as well as the draft cards which were in fact seized fall within that class of objects properly subject to seizure. Certainly this is not a case of search for or seizure of an individual's private papers, nor does it involve a prosecution based upon the expression of political or religious views in such papers.

"Nor is it a significant consideration that the draft cards which were seized were not related to the crimes for which petitioner was arrested. Here during the course of a valid search the agents came upon property of the United States in the illegal custody of the peti-

> tioner. It was property of which the Government was entitled to possession. In keeping the draft cards in his custody petitioner was guilty of a serious and continuing offense against the laws of the United States. A crime was thus being committed in the very presence of the agents conducting the search. Nothing in the decisions of this Court gives support to the suggestion that under such circumstances the law-enforcement officials must impotently stand aside and refrain from seizing such contraband material. If entry upon the premises be authorized and the search which follows be valid, there is nothing in the Fourth Amendment which inhibits the seizure by law-enforcement agents of government property the possession of which is a crime, even though the officers are not aware that such property is on the premises when the search is initiated." *Harris* v. *United States*, *supra* at 153-156.

We find several factors existing in the instant case which differ from the *Harris* case:

(1) Here the cancelled check upon which the original warrant was based was a government check, and hence in the possession of the government. The government's agents did not need to search anything (other than their own files) for it.

(2) Whether this search was made in good faith (as was found in *Harris*, *supra*) and was not purely an exploratory [fol. 1193] search (as was found in *Go-Bart Co.* v. *United States*, *supra*, and *United States* v. *Lefkowitz*, 1932, 285 U.S. 452), is clouded by the alleged maneuvering of Special Agent Hirst to make the arrest in appellant's combined home and office, and not on the street, in the Federal Building, or in a public restaurant.

(3) In *Harris*, *supra*, the seized "draft cards," were property the mere possession of which was a crime.[20] It

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[20] "54 Stat. 885, 894-895, 50 U.S.C. App. § 311. Section 623.61-2 of the Selective Service Regulations states that 'It shall be a violation of these regulations for any person to have in his possession' a Notice of Classification not regularly issued to him or to alter or forge any Notice of Classification. Section 11 of the Act makes the failure to

was property of which the United States was entitled to possession.[21] Here neither the possession of copies of various taxpayers' returns, nor of their or the appellant's work papers to support the returns, was in any way illegal; nor was the United States entitled to possession. At best, the United States was entitled to examine.

(4) In *Harris, supra*, in keeping the draft cards in his custody, petitioner was guilty of a serious and continuing offense against the laws of the United States. "A crime was thus being committed in the very presence of the agents conducting the search."[22] In the instant case, possession or custody of the returns, work papers, or even of uncashed government checks was no offense against the laws of the United States, and no offense was being committed in the presence of the agents making the arrest.

[fol. 1194] Likewise, in *United States* v. *Rabinowitz, supra*, the "Kansas" and "Nebraska" overprinted postage stamps therein involved constituted a fraud on the government, and the mere possession of such forged and altered stamps was a crime, "just as it is a crime to possess burglars' tools, lottery tickets or counterfeit money."[23]

Thus the objects originally seized herein were not utilized to perpetrate a crime any more than any other evidentiary material which leads to an ultimate conclusion that a crime

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perform any duty required by the Regulations punishable by imprisonment for not more than five years or a fine of not more than $10,000.00 or both." Harris v. United States, supra at 147, n. 2.

"35 Stat. 1098, 18 U.S.C. § 101. Insofar as pertinent, the section provides: 'Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any . . . property of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than $5,000, or imprisoned not more than five years, or both: . . . .'" Harris v. United States, supra at 147, n. 3.

[21] Davis v. United States, 1946, 328 U.S. 582, 590.

[22] Harris v. United States, supra at 155.

[23] United States v. Rabinowitz, supra at 64.

has been committed. This distinction is one "of importance, for 'limitations upon the fruit to be gathered tend to limit the quest itself . . . .'"[24]

We think we must recognize and respect

> ". . . the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including [1] the instrumentalities and means by which a crime is committed, [2] the fruits of crime such as stolen property, [3] weapons by which escape of the person arrested might be effected, and [4] property the possession of which is a crime." *Harris* v. *United States*, *supra* at 154 (Numbers inserted.)

The government relies on the foregoing language (previously quoted herein), but we think it supports appellant on the facts of this case. To make it apt, the government cites the facts of *Abel* v. *United States*, 1960, 362 U.S. 217, and emphasizes the physical evidence seized therein (a piece of graph paper, two birth certificates, a vaccination certificate, a bank book, a hollowed out pencil containing eighteen microfilms, and a "cipher pad."[25] While the defendant

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[24] Id. at 64, n. 6, quoting United States v. Poller, 2 Cir., 1930, 43 F.2d 911 at 914.

[25] "(1) a piece of graph paper, carrying groups of numbers arranged in rows, allegedly a coded message;
"(2) a forged birth certificate, certifying the birth of 'Martin Collins' in New York County in 1897;
"(3) a birth certificate, certifying the birth of 'Emil Goldfus' in New York in 1902 (Emil Golfus died in 1903);
"(4) an international certificate of vaccination, issued in New York to 'Martin Collins' in 1957;
"(5) a bank book of the East River Savings Bank containing the account of 'Emil Goldfus';
"(6) a hollowed-out pencil containing 18 microfilms; and
"(7) a block of wood, wrapped in sandpaper, and containing within it a small booklet with a series of numbers on each page, a so-called 'cipher pad.'" Abel v. United States, supra at 220.

[fol. 1195] Abel was tried upon a charge of conspiracy to commit espionage, the search in question arose out of his administrative arrest by the United States Immigration and Naturalization Service as a preliminary to his deportation as an alien suspected and officially accused of espionage. *Cf.* 362 U.S. 217, 218-219.

In *Abel*, Mr. Justice Frankfurter says:

> "The only things sought here, in addition to weapons, were documents connected with petitioner's status as an alien. These may well be considered as instruments or means for accomplishing his illegal status, and thus proper objects for search under *Harris, supra.*" *Id.* at 237.

The Court goes on: "[I]tem (2), [was] a forged New York birth certificate for 'Martin Collins,' one of the false identities which petitioner assumed in this country to keep his presence here undetected." This was a document "used as a means to commit crime" (*Id.* at 238). Item (1), the graph paper, was seized when petitioner attempted to hide it at the time of his arrest. This was valid seizure to prevent destruction. Items (3), (4) and (5) were documents taken by petitioner with him to a place of subsequent search. "They were all capable of being used to establish and maintain false identity . . . ." Items (6) and (7) were articles abandoned in a vacated room. They were *bona vacantia*, and the government was entitled to appropriate them.

While the files taken in this case approach the category of some of the items seizable in *Abel*, yet they do differ, and if we respect the boundaries laid down in *Harris, supra*, and *Rabinowitz, supra*, reaffirmed by *Abel*, as we see such [fol. 1196] lines of distinction drawn, we are constrained to hold the search and seizure in this case went too far.

Administrative arrest of an alien suspected and accused of espionage preliminary to deportation inherently and logically creates an opportunity for search and seizure far larger in scope and area than search of either alien or citizen incidental to an arrest on a charge of forgery of a single check.

Appellee relies heavily on our holding in *Leahy* v. *United States*, 1959, 272 F.2d 487, writ of *certiorari* dismissed, 364

U.S. 945. If the appellant here had been accused in the warrant of a conspiracy to defraud the government by presenting false claims and obtaining checks through the filing of various fraudulent income tax returns in the names of various clients, then perhaps the search could have been honestly classified as one seeking certain records as the instrumentalities of an illicit business, *Marron* v. *United States*, 1927, 275 U.S. 192, and as was done in *Leahy*, *supra*. Further, as Judge Pope points out in his concurring opinion, there was in *Leahy* present the possibility of the destruction of evidence. No evidence of such a threat here exists.

We conclude that the motion of the appellant to suppress the evidence seized relating to all counts save Counts 21 and 22 should have been granted.

But this does not solve our problem. Appellant says if his motion to suppress had been granted, there would have been no evidence on twenty-nine of the counts. The government says they had had the returns of all the taxpayers represented by appellant "pulled" long before the arrest in this case; and that the testimony of such taxpayers would have been the same as was presented, regardless of the search.

We have no way of ascertaining what evidence the government could have produced, had the motion to suppress been granted. Holding that the motion to suppress must be granted, we are required to vacate the judgments of conviction and remand the matter for retrial on Counts 4 to 20, and 23 to 34.

On a retrial, we are not intimating any opinion that the evidence produced by the government against appellant was or was not "the fruit of a poisonous tree." That remains for the consideration of the trial court.

[fol. 1197] The conviction and sentences of the appellant on Counts 21 and 22 are, and each is, *affirmed*.

(As amended by order of May 19, 1961.)

[File endorsement omitted.]

[fol. 1198] In United States Court of Appeals for the Ninth Circuit

No. 17034

R. Milo Gilbert, Appellant,

vs.

United States of America, Appellee.

Judgment—Filed and Entered March 30, 1961

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of Record from the United States District Court for the Southern District of California, Central Division.

On consideration Whereof, It is now here ordered and adjudged by this court, that the conviction and sentences of the appellant on counts 21 and 22 are each is affirmed, and that the conviction and sentences on counts 4 to 20, and 23 to 34 are vacated, and the cause is remanded to the said District Court for retrial on said counts 4 to 20, and 23 to 34.

[File endorsement omitted.]

[fol. 1199] In United States Court of Appeals for the Ninth Circuit

No. 17,634

R. Milo Gilbert, Appellant,

vs.

United States of America, Appellee.

Order on Petition for Rehearing—May 19, 1961

Before: Barnes, Hamley and Hamlin, Circuit Judges

Appellant urges on petition for rehearing that the conviction of appellant on counts 21 and 22—forgery—should be reversed on the ground the opinion of this court was in error in stating that there was no proof in writing that appellant was authorized to *endorse* and *collect* the checks, and appellant cites Exhibit M—the power of attorney—as proof this court was wrong.

It would have been better for this court to have added the words "adequate and convincing" before the word "proof" (page 8, last paragraph, 1st line of slip opinion). We now amend our opinion of March 30, 1961, by such amendment. The sentence then reads:

> "There being no adequate or convincing proof of such authority in writing, appellant must rest on an oral authority to sign as Trustee, and realize upon the checks."

Exhibit M, on its face, authorizes "R. Milo Gilbert" to endorse and negotiate refund checks for income taxes. It nowhere purports to authorize "R. Milo Gilbert, Trustee" to so, or in any way, act.

Because the person named in a power of attorney as attorney in fact had some or all the obligations toward his [fol. 1200] principal of acting as a Trustee is required to act, does not make him a trustee in fact or law. Appellant had no authority, written or oral, to sign checks or otherwise act, as Trustee. He purported to so act, but could not do so by reason of any specific provision or authority granted by the

power of attorney. If there were only evidence that appellant had acted solely in good faith and not fraudulently as Trustee, he might now be heard to claim his signing as Trustee was actually an act done pursuant to the power of attorney he held. But we cannot and do not so interpret his action, in view of the substantial evidence to support the fraudulent returns which were the basis of the refunds which resulted in the issuance of the checks upon which Counts 21 and 22 were based.

The foregoing is written upon the assumption that the written power of attorney was valid. As we pointed out in our opinion of March 30, 1961 (p. 8), the Bartfields denied that their signatures were notarized. Each admitted the signatures appeared to be theirs, but each denied ever having sworn to the jurat before any notary public. (Tr. p. 453-462.)

The notary public acknowledging the makers' signatures was Ruth Gilbert. Who she may be does not appear in the record. She did not testify in the case. She apparently was related to appellant Gilbert (Tr. p. 461), but the exact relationship is not disclosed.

The case was tried on the theory that the transactions which originated the subsequent issuance of the checks claimed to have been endorsed fraudulently were all material. The nature of the returns and all documents connected with the refunds, whether fraudulent or not, were material in the appraisal of the subsequent endorsement of "R. Milo Gilbert, Trustee."

The court and jury might well have concluded, as we might, to support the verdict, that the jury found the power of attorney was (a) a forgery, or (b) unnotarized and incomplete before delivery, or (c) executed in blank, or (d) executed with no specific power to endorse checks (which provision had been inserted after the original drafting by use of a caret).

But it is unnecessary for us to decide what theory appealed to the jury. We reaffirm there existed "beyond [fol. 1201] question substantial evidence to support the conviction of appellant on Counts 21 and 22"—concerning which the evidence had been properly obtained.

With the addition of the three words hereinabove set

forth to the opinion, it is reaffirmed, and the petition for rehearing is otherwise in all respects *denied*.

Stanley N. Barnes, Frederick G. Hamley, O. D. Hamlin, United States Circuit Judges.

[File endorsement omitted.]

[fol. 1202] United States Court of Appeals for the Ninth Circuit

Before: Barnes, Hamley and Hamlin, Circuit Judges.

Minute Entry of Order Denying Petition for Rehearing—May 19, 1961

Pursuant to the order this day filed, and on consideration of the petition of appellant, filed April 27, 1961, and within time allowed therefor by rule of court, for rehearing above cause, It is Ordered that said petition be, and hereby is denied.

[fol. 1203] Clerk's Certificate to foregoing transcript omited in printing.

[fol. 1204] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1961

No. 216 Misc.

R. MILO GILBERT, Petitioner,

vs.

UNITED STATES

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—October 9, 1961

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 478.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1961

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 178

R. MILO GILBERT,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S OPENING BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 478

R. MILO GILBERT,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S OPENING BRIEF

Opinions Below

Trial in the District Court was by jury.

The opinion of the court below (R. 108) and on petition for rehearing (R. 127) are reported at 291 F. 2d 586 and 597, respectively.

Grounds on Which the Jurisdiction of This Court Is Invoked

The judgment of the Court of Appeals was filed and entered on March 30, 1961 (R. 126).

Timely filed petition for rehearing was denied on May 19, 1961 (R. 129).

The petition for writ of certiorari was filed on June 19, 1961, June 18 being a Sunday.

Certiorari was granted on October 9, 1961.

This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 USC 1254(1), Rule 22(2) of this Court and Rule 37(b), Federal Rules of Criminal Procedure.

Constitutional Provisions and Statute Involved

The Fifth Amendment to the Constitution provides in pertinent part:

> "No person shall be . . . deprived of life, liberty or property, without due process of law; . . ."

18 USC 495 (62 Stat. 711):

> "Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or
>
> "Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or
>
> "Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited—
>
> "Shall be fined not more than $1,000 or imprisoned not more than ten years, or both."

Questions Presented for Review

1. Is it a denial of due process of law for one to be convicted of forgery of government refund checks and that conviction affirmed on a theory that the checks were received by the defendant as a part of the filing of fraudulent income tax returns when there was no charge or evidence that the income tax returns were fraudulent and where the income tax returns were not introduced in evidence at all and in face of the fact that the payees of the checks had signed a written power of attorney which gave the defendant *in haec verba* the right to endorse and collect the checks?

2. Is it forgery within the meaning of 18 USC 495 when the endorsement of the check shows on its face that the signer does not purport to be signing the signature of the payees but rather that he is signing their names by himself as trustee?

Statement of the Case

The indictment (R. 1-16) was in 35 counts, some of which (1 through 11 [R. 1-7] and 23 through 35 [R. 11-16]) charged violation of 26 USC 7206(2), others (12 through 17 [R. 7-9] and 21 and 22 [R. 11]) charged violation of 18 USC 495 and still others (18 through 20 [R. 9-10]) charged violation of 18 USC 1001. The jury found petitioner not guilty on counts 1, 2, 3 and 35 (R. 21-22) and guilty on counts 4 through 34 (*ibid.*). The court below reversed and remanded as to counts 4 through 20 and 23 through 34 (R. 126) and affirmed as to counts 21 and 22 (*ibid.*). Only the judgment as to counts 21 and 22 are involved in the writ before this Court.

Counts 21 and 22 (R. 11) charge that "(o)n or about June 2, 1958, . . . the defendant R. Milo Gilbert knowingly and wilfully[1] forged on (two) United States Treasury check(s) . . . in the amount(s) of ($848.11 and $556.04, respectively) the endorsement(s) and signature(s) of the payees, Daniel H. and Chalrene (sic) R. Bartfield, for the purpose of obtaining and receiving said amount(s) from the United States, its officers and agents."

This called into play only the first paragraph of 18 USC 495 and only that portion thereof which proscribes forgery.[2]

The Government's entire case on Counts 21 and 22, including cross-examination, covers but twelve and one-half pages of the 1172 pages of Reporter's Transcript. It appears in the printed record from pages 41 through 50. It consists of the testimony of Mr. Daniel Bartfield (R. 41-46), Mrs. Charlene Bartfield (R. 46-49) and two exhibits, Nos. 31 and 32 (R. 50, 83, 87). During Mr. Bartfield's cross-examination, defendant's Exhibit M (R. 106-107) was likewise admitted into evidence (R. 44).

Exhibits 31 (R. 50, 83) and 32 (R. 50, 87) are the two checks in question. They show on their front sides that they are made payable to

"DANIEL H & CHARLENE R BARTFIELD
"c/o R MILO GILBERT"[3]

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[1] There was no allegation of falsity as seemingly required by 18 USC 495.

[2] As distinguished from "mak(ing), alter(ing) or counterfeit(ing)". And compare Counts 15, 16 and 17 which charge under the third paragraph of section 495 (R. 8-9).

[3] On Exhibit 32, Charlene is spelled Cha*l*rene, and Milo is spelled Mil*e*.

and on their reverse sides that they are endorsed

"Daniel H Bartfield
"Charlene R Bartfield
'R Milo Gilbert, Trustee" '

Exhibit M (R. 44, 106-107) is a special power of attorney admittedly signed by Mr. Bartfield (R. 44, 45) and by Mrs. Bartfield (R. 44, 48) making petitioner their "true and lawful attorney for (them) and in (their) name, place and stead and for (their) use and benefit: (a) For all matters

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'The pictures of Exhibits 31 and 32 appearing in the printed record (R. 83, 87) are not pictures of the actual exhibits. They are pictures of copies obtained from the Treasury Agent at Los Angeles when the actual exhibits were not found by the Clerk of this Court among the exhibits transferred to this Court by the Clerk of the Court of Appeals. See telegram dated November 9, 1961 from the Clerk of this Court to petitioner's counsel, letter dated Nov. 17, 1961 from petitioner's counsel to the Clerk of this Court, letter dated Nov. 28, 1961 from the Clerk of the Court below to the Clerk of this Court, letter dated Dec. 1, 1961 from the Clerk of this Court to petitioner's counsel, letter dated Jan. 16, 1962 from petitioner's counsel to the Clerk of this Court, letter dated Jan. 19, 1962 from the Clerk of this Court to petitioner's counsel. As will be noted the word "by" does not appear in front of the name of R. Milo Gilbert in the picture as was set forth in Question 2 of the petition for writ of certiorari (pg. 3) and considered to have been the case in the body thereof (pg. 4). As the Argument below will show, this does not alter the legal question involved, for even without the word "by", the endorsements, especially in the light of the way the payee portions on the front side of the checks are made out, still show that Gilbert was the person who was signing and there was no pretense that anyone's signature was being duplicated. Nor does this alter the case factually because all through the case the parties viewed the endorsement as "Bartfields by Gilbert, Trustee". This was so in the trial court by the Court (R. 63, 64) and counsel (R. 20, 63; Original Reporter's Tr. 983 [not reproduced in the printed record because at the time of the designation, the instant problem was not known to exist]), in the court below by the Court (R. 115) and Counsel (Appellant's Open. Br. 45; Government's Br. 23) and in this Court (Petition, pp. 3 and 4; Govt's Br. in Opposition, 3) until receipt of the printed record with the pictures therein as explained above.

pertaining to (their) . . . Income Taxes and Tax Returns for the Calendar years 1954 to 1957 inclusive. This includes . . . the filing of necessary refund claims; and the receiving, depositing, endorsing and otherwise negotiating such refund checks at his sole discretion, including the right of offset."

It was stipulated that the endorsements were by petitioner and not by the Bartfields (R. 43, 47).

Acknowledging that the signature on the power of attorney was his (R. 44, 45), Mr. Bartfield also testified that he had not authorized petitioner to sign his name or endorse the checks, that he had not appointed, nor was, petitioner his trustee (R. 43), that he does not remember signing the power of attorney nor petitioner having asked him to do so (R. 45), and that he did not appear before a Notary Public and take oath that he had executed the power of attorney (*ibid*. Mrs. Bartfield testified in similar vein (R. 47, 48, 49) and likewise acknowledged that the signature on the power of attorney was her own (R. 48).

On this evidence the jury convicted of forgery and, as seen, the court below affirmed.

The trial court refused (R. 66, 76) to give the instructions requested by petitioner (R. 20) to the effect that

> "*One who* executes an instrument purporting on its face to be executed by him as agent of a principal named therein, when in fact he has no authority from such principal to execute said instrument, is not guilty of forgery."[5]

[5] The printed record (R. 20) reads "*for* such principal etc." This is a typographical error. The original reads "*from* such principal etc." (Clerk's Tr. 166).

and

> "A check endorsed as follows—name of payee by other as trustee, does not constitute a forged instrument under U.S.C. Title 18, Section 495."

The refusal was appropriately objected to (R. 76).

Summary of Argument

1. Petitioner was charged with forgery of the endorsements on two Government checks. The checks were payable to "Daniel H and Charlene R Bartfield c/o R Milo Gilbert". The endorsements were "Daniel H Bartfield Charlene R Bartfield R Milo Gilbert, Trustee" or "Daniel H Bartfield Charlene R Bartfield by R Milo Gilbert, Trustee". The endorsements show on their face and petitioner stipulated that the handwriting of all three names was that of petitioner. Under these circumstances the crime of forgery was not committed. Even if petitioner did not have authority to sign the Bartfield names, a proposition petitioner stoutly disputes, there was no forgery because there was no pretense, no covering up, no palming off nor attempt to have the Bartfield names considered as having been signed by the Bartfields, it being clear that petitioner wrote those names. Accordingly, if any crime was committed, it was not forgery. At the most it would be a false representation of authority to sign; this is not forgery.

2. There was no evidence nor even contention by the Government that the checks were not proper refund checks, nor that the Bartfields were not entitled to the money the checks represented nor that petitioner got the money nor that if petitioner did get the money, he was not entitled thereto. The two counts involving these checks were caught up in a trial involving a multitude of other counts most

of which charged the preparation of false and fraudulent income tax returns, but there was no charge either by way of a count or counts in the indictment and no evidence of any kind that any Bartfield returns were falsely or fraudulently prepared. Nevertheless, the Court below, even in the face of a power of attorney admittedly signed by the Bartfields, though they did not remember signing it, sustained the conviction "in view of the substantial evidence to support the fraudulent returns which were the basis of the refunds which resulted in the issuance of the checks upon which Counts 21 and 22 were based." There is simply no evidence in the record to that effect. Indeed, the returns to which the court was apparently referring were not even introduced into evidence nor was there any evidence, even though the returns were not introduced, that they were not correct. Accordingly, petitioner's conviction was sustained in the face of a complete absence of evidence and on the basis of a charge not even made. This is more, therefore, than simply there not being substantial evidence to support a conviction; this is a denial to petitioner of due process of law.

ARGUMENT

I

It Is Not Forgery Under 18 USC 495 When the Instrument Shows on Its Face That the Signer Does Not Purport to Be Signing the Signature of Another Person But Is Acting as Agent or Trustee.

Petitioner was convicted of *forgery* although anyone by merely looking at the endorsement could at once see that the signer was not purporting to falsify another person's signature, but that he was telling the whole world that he, R. Milo Gilbert, was the person who was signing. There is no pretense that anyone's signature was being duplicated. This is especially clear when one examines the face of the checks (R. 50, 83, 87), they being payable to "Daniel H & Charlene R Bartfield c/o R Milo Gilbert".

Under these circumstances, the law is and should be that no *forgery* is committed.[6] The principle is thus stated in 37 CJS, Forgery, §8, page 38:

> "An agent may commit forgery by signing an instrument in disobedience of his instructions or in improper exercise of authority, but one who executes an instrument purporting on its face to be executed by him as an agent, when in fact he has no authority to execute such instrument, is not guilty of forgery."[7]

---

[6] Whether, assuming the requisite knowledge and intent, some other offense is committed, is beside the point. One cannot be charged with one offense and be found guilty of another (*Cole* v. *Arkansas*, 333 U.S. 196; *Stirone* v. *United States*, 361 U.S. 212).

[7] It will be noted that this rule is precisely in accordance with the instructions requested by petitioner (R. 20), but refused by the trial court (R. 66). 23 Am. Jur., Forgery, § 10, page 680, is in accord.

The overwhelming weight of authority, both State and Federal, from the very earliest to just last year, supports this rule of law.

a. Federal Cases

In re Tully, 20 Fed. 812 (SD NY 1884), held that a check signed "per pro. the Preston Bank Company; G. T. Tully, submanager." was not a forgery whether Tully had authority to draw such a check or not because (pg. 815) "the signature by him in his own name 'per procuration,' etc. showed on its face all that it purported to be." The court found this to be the English law and referred to two English cases, *Regina* v. *White*, 2 Car. & K. 404 and *Charles Windsor*, 6 Bert & S. 522. From the latter the court quotes (pg. 817) from the opinion of Cockburn, C.J.:

> "'. . . We must take the term "forgery" in the extradition act to mean that which by universal acceptation it is understood to mean, namely the making or altering a writing so as to make the writing or alteration purport to be the act of some other person, while it is not.'"

and from the opinion of Blackburn, J.:

> "'Forgery is the falsely making or altering a document to the prejudice of another, by making it appear as the document of that person; telling a lie does not become forgery because it is reduced to writing.'"

In *International Finance Corporation* v. *People's Bank of Keyser*, 27 F. 2d 523 (ND W Va 1928), affd. 30 F. 2d 46 (CCA 4 1929), cert. den. 279 U.S. 858, a certificate of deposit was issued and signed "T. D. Leps, Cashier". The court held that this was not forgery, saying (pg. 526):

". . . There was no false making of the certificate of deposit by another than the person who purported to sign it. Leps, the cashier, made it. It is admitted that the signature to the certificate of deposit is that of Leps, cashier, the man who purported to sign the instrument, and that he was actually the cashier of the defendant bank, as the certificate of deposit stated he was. Thus 'the wrong done, where such an instrument is made without authority consists in the false assumption of authority to bind another, and not in making a counterfeit or false paper' (not a forgery)."

In *Greathouse* v. *United States*, 170 F. 2d 512 (CA 4 1948), checks were signed, in the presence of the bank cashier, "Woodruff Motor Sale Inc., J. W. Greathouse". Holding that this was not forgery, the court said (pg. 514):

". . . It is well established that forgery contemplates a writing which falsely purports to be the writing of another person than the actual maker. . . . (I)f the writing purports or is known to be the writing of the defendant, it is not forgery for him to sign the name of another although he signs without the other's knowledge or consent under the false pretense that he had authority to do so; . . ."[5]

In *Torrance National Bank* v. *Aetna Casualty & Surety Co.*, 150 F. Supp. 638, 639 (SD Cal 1957), affd. 251 F. 2d 666 (CA 9 1958), a diversity case, the court, in response to plaintiff's argument (pg. 639) "that the unauthorized signing by an agent of his own name as agent constitutes a 'forgery'," held that *People* v. *Bendit*, 111 Cal. 274, 43

[5] The correctness of the *Greathouse* decision was affirmed by the Fourth Circuit in a later decision, *Cunningham* v. *United States*, 272 F. 2d 791, 793-794 (CA 4 1959) and followed by the Third Circuit in *United States* v. *Carabasi*, 292 F. 2d 362, 364 (1961).

P. 901, was the law of California and early had (pg. 640) "unequivocally articulated the law to be that an instrument signed by the one purporting to have executed it is not a 'forgery'."

Aside from *United States* v. *Carabasi*, 292 F. 2d 362, *supra*, fn. 8, the latest Federal case on the subject appears to be *Selvidge* v. *United States*, 290 F. 894 (CA 10) decided May 10, 1961, subsequent to the decision herein by the court below on the merits, but one week before the denial of the petition for rehearing. There, the endorsement was the company's name by means of a rubber stamp and then in handwriting, "By Thelma L. Selvidge". Reversing the conviction, the Tenth Circuit said (pg. 895):

> ". . . It is a rule of general application that an agent may commit forgery by making or signing an instrument in disobedience of his instructions or by exceeding his authority. But when she added her genuine signature purporting to endorse the checks as the agent of her named principal, although she had no authority to do so, she was not guilty of forgery. The endorsements were precisely what they purported to be; the wrongful act being a false pretense or false representation of authority. . . . "

b. State Cases

The state court cases are overwhelmingly in accord with petitioner's contention. The following listing will demonstrate.

California

People v. *Bendit*, 111 Cal. 274, 43 Pac. 901 (1896). The writing there was signed "Wm. Cluff & Co. A.B." The court held there was no forgery, saying (111 Cal. at 276):

> "It is quite clear that the facts above stated do not constitute forgery. When the crime is charged to be the false making of a writing, there must be the making of a writing which falsely *purports to be the writing of another*. The falsity must be in the writing itself—in the manuscript. A false statement of fact in the body of the instrument, or a false assertion of authority by which a person is deceived and defrauded, is not forgery. There must be a design to pass as the genuine writing of another person that which is not the writing of such other person. The instrument must fraudulently purport to be what it is not. And there was nothing of the kind in the case at bar. . . ." (Italics in original.)

The correctness of the *Bendit* case was affirmed by the California appellate court as recently as 1955 in *Pasadena Investment Co.* v. *Peerless Cas. Co.*, 132 Cal. App. 2d 328, 331, 282 P. 2d 124.[9]

GEORGIA

Barron v. *State*, 12 Ga. App. 342, 77 S.E. 214 (1913) ("W. R. Amason, per W.H.B.").

Samples v. *Milton County Bank*, 34 Ga. App. 248, 129 S.E. 170 (1925) "Mrs. N.B. Samples, by N.B. Samples").

Cf. *Morgan* v. *State*, 77 Ga. App. 164, 48 S.E. 2d 115 (1948) (false oral representation of authority to sign father's name on check which was done in the presence of the cashier. HELD: Not forgery).

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[9] *Bendit* was likewise followed by the United States District Court for the Southern District of California as representing the California law in *Torrance Natl. Bank* v. *The Aetna Casualty & Surety Co.*, 150 F. Supp. 638, 640 (1957), *supra*, affd. 251 F. 2d 666 (CA 9 1958).

LOUISIANA

State v. *Taylor*, 46 La. Ann. 1332, 16 So. 190 (1894) (Defendant signed the names of a number of persons to a note and then wrote, "I was authorized to sign the above names, I secured the order. E.R. Taylor." Held: Not forgery).

MASSACHUSETTS

Commonwealth v. *Baldwin*, 11 Gray (77 Mass.) 197, 71 Am. Dec. 703 (1858) (note signed "Schauler, Baldwin & Co." the payee knowing that the defendant had so signed and believing him to be a partner in the firm. Held: Not forgery. [Pg. 198]: "to constitute forgery, the writing falsely made must purport to be the writing of another party than the person making it.")

MINNESOTA

State v. *Wilson*, 28 Minn. 52, 9 N.W. 28 (1881) (Deed was signed "James D. Hoitt, by H.H. Wilson, his attorney in fact." Held: Not forgery [9 NW at 30]: "if a person sign an instrument with his own name per procuration of the party whom he intends or pretends to represent, it is no forgery, it is no *false making* of the instrument, but merely a false assumption of authority.") (Italics in original.)

MISSOURI

State v. *Kinder*, 315 Mo. 1314, 290 S.W. 130 (1926) (Check was made payable to the order of C. T. Kinder and signed "Samuel Fowler by Kinder." Held: No forgery; the motion to quash the information should have been sustained.)

NEBRASKA

Goucher v. *State*, 113 Neb. 352, 204 N.W. 967 (1925) (without authority the County Clerk signed and had approved a warrant for a bill which did not exist. Held: No forgery. [Pg. 968]: "The words 'whoever falsely makes' generally apply to the false making of the writing as distinguished from the contents of the instrument itself.")

NEW YORK

People v. *Mann*, 75 N.Y. 484, 31 Am. Rep. 482 (1878) (To the same effect as *Goucher* v. *State*, 113 Neb. 352, 204 NW 967, *supra*).

NORTH CAROLINA

State v. *Lamb*, 198 N.C. 423, 152 S.E. 154 (1930) (check endorsed: "M.P. Mitchell, R.W. Lamb", receipt given by Lamb when he cashed the check was: "M.P. Mitchell by R.W. Lamb." The trial proceeded on the theory that the receipt and the endorsement were to the same effect: that Lamb was pretending in each instance to act in the capacity of authorized agent. Held: no forgery. "The reason is [152 SE at 156] that forgery cannot be predicated of a writing not intended to be a semblance of something which it does not purport to be and which is in itself not false.")

OKLAHOMA

Ex Parte Offutt, Okl. Cr. App., 234 Pac. 222 (1925) (Check signed by petitioner as agent of a firm. Held: not forgery, citing and quoting from *State* v. *Taylor*, 46 La. Ann. 1332, 16 So. 190 and *People* v. *Beidit*, 111 Cal. 274, 43 P. 901.)

Schulte v. *State*, 41 Okla. Cr. 173, 271 P. 1045 (1928) (stock certificate was signed

"R. Bess, President

"S"

The Court held there was no forgery [271 P. at 1048]: "It is also immaterial as to whether or not he signed the name of R. Bess, the president of the company, with or without his authority. When he signed the name of R. Bess as president and placed his initial 'S' under it, he was thereby showing his agency. The certificate shows to have been executed by the agent, and we hold that it did not purport to be an instrument executed by R. Bess as president of the gin company; . . . ")

TENNESSEE

Mallory v. *State*, 179 Tenn. 617, 168 S.W. 2d 787 (1943) (The endorsement on the check was: "Labor Advocate, by P. T. Mallory." Held: not forgery).

TEXAS

Simms v. *State*, 116 Tex. Cr. 97, 32 S.W. 2d 852 (1930) (Check signed "R.C. Simms, by George Simms." Held: No forgery. [32 S.W. 2d at 853]: "While one who signs to a document the name of another by himself as agent thereby creates an instrument which, if used to defraud, might subject him to prosecution for swindling, we do not think such document can be the subject of forgery by the said agent.")

WASHINGTON

Dexter Horton National Bank v. *United States Fidelity & Guarantee Co.*, 149 Wash. 343, 270 P. 799 (1928) (checks made out to his employer were unauthorizedly endorsed: "Crenshaw & Bloxom, H.N. Howe, Cashier." Held: not forgery [270 P. at 801]: "the act of Howe in endorsing the words above quoted upon checks payable to his employer

did not constitute forgery either within any technical definition of the word or its popular meaning.") [10]

From the above resume it is seen that petitioner was not guilty of forgery. The jury should have been so instructed. The court below should have been reversed.

II

Petitioner Was Denied Due Process of Law Because He Was Convicted and the Conviction Affirmed in the Absence of Evidence.

Although there is pending before this Court on this writ only two counts involving but a single question of law, there were pending before the trial court 35 counts and before the court below 31 counts involving many factual situations and questions of law. The case before the courts below is an example of how, where there are such a multitude of issues, facts and documents, the issues on any single count become blurred and resulted, as we will show, in confusing the various counts and of convicting on one count (here, two, Counts 21 and 22) because of the evidence and charge of other counts (Cf. *United States* v. *Bufalino*, 285 F. 2d 408 [CA 2 1960]). The conviction in this case is no more supportable—because of the lack of evidence—than were the convictions in *Thompson* v. *Louisville*, 362 U.S. 199 and *Garner* v. *Louisiana*, —— U.S. ——, 30 U.S. Law Week 4070. Here as there, the conviction violates due process of law.

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[10] The case is of additional interest to the instant case because the argument was made that since there were no words of procuration immediately before Howe's name the representation was that the first signature was genuine and not written by Howe. The court rejected the argument, saying (270 P. at 801): "(T)he situation is the same as though Howe had added the word 'by' before his name and the word 'its' before the word 'cashier', or written other words of similar import. The presence or absence of words of procuration has nothing to do with the question of whether or not the words written by Howe constituted forgery."

In its original opinion (see R. 127; 115-116) the court below said:

> "The jury was correctly instructed that a written power of attorney to prosecute a claim against the government and giving authority to an agent to *receive* a check, gives that agent no power to *endorse* and *collect* the check. Such authority may be given either orally or in writing. . . .
>
> "There being no proof of such authority in writing, appellant must rest on an oral authority to sign as Trustee, and realize upon the checks. Appellant claims he had this. Such authority was denied by both Bartfields. At best this presents a question of credibility, decided adversely to appellant below, and this evidence must be looked upon by us, on this appeal, in the light most favorable to support the government's case here. . . ." (Emphasis in original.)

When, on petition for rehearing, it was called to the attention of the court below that there was a written power of attorney and that it *expressly* gave the right to receive, deposit and endorse the checks, the court amended its opinion (R. 127) by inserting the words "adequate or convincing" between the words "no" and "proof".

How the court could arrive at this conclusion in the face of the clear language of the power of attorney is not easily understood. But pass that; the misunderstanding by the court below and its confusing of Counts 21 and 22 with other counts in the indictment is clearly seen from this statement (R. 128):

> ". . . If there were only evidence that appellant had acted solely in good faith and not fraudulently as Trustee, he might now be heard to claim his signing as Trustee was actually an act done pursuant to the

> power of attorney he held. But we cannot and do not so interpret his action, in view of the *substantial evidence to support the fraudulent returns* which were the basis of the refunds which resulted in the issuance of the checks upon which Counts 21 and 22 were based." (Emphasis added.)

There is simply nothing—but nothing—to support this statement and such a view of the evidence.

In the first place, petitioner was not charged with filing a fraudulent return for the Bartfields. In the second place, the Government never *claimed* and there is no claim that the Bartfield returns were fraudulent. In the third place, the tax returns are not in evidence and were not even offered in evidence (R. 89, 97).[11] In the fourth place, there just is no evidence *at all*, substantial or otherwise, that the Bartfield tax returns were fraudulent. The entire evidence on the Bartfield counts appears in the record from pages 41 through 49. Nowhere therefrom can there be gleaned even a whisper—not a scintilla—that the tax returns were incorrect, or that petitioner had acted fraudulently or that petitioner was not entitled to the money.

On what ground, therefore, can such a conviction be allowed to stand? If the court below made so basic an error, one can imagine the problems of the jury.[12]

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[11] As to some of the other forgery and false representation counts, the Government offered the tax returns, e.g. Exhs. 10 & 11 (R. 33, 34, 53); Exh. 15 (R. 35, 37); Exhs. 17 and 20 (R. 38, 39); Exhs. 18 & 21 (R. 40, 53); Exh. 27 (R. 51); Exh. 28 (R. 52). The Bartfield returns were marked for identification as Exhibits 33 and 34 (R. 41) but not offered (R. 50, 89, 97).

[12] Especially in the light of the instruction (R. 75) to the jury that a written power of attorney to *receive* a check gives no power to endorse and collect a check—all in the face of the precise language of Exhibit M (R. 44, 106-107) giving *precisely* the power to endorse and collect.

Other errors by the court below are equally bad. The court makes a point (R. 127) that the power of attorney (Exhibit M, R. 44, 106-107) authorized "R. Milo Gilbert" to endorse and negotiate the checks, but that it does not say anything about "R. Milo Gilbert, Trustee". What possible difference could that make? If the word "by" appeared in front of "R. Milo Gilbert" on the endorsement and the word "Trustee" had been left off so that the endorsement read: "Bartfields by Gilbert", would there have been any less a forgery? We submit not. Nor does the addition of the word "Trustee" either with or without the "by", make it any more a forgery. It is not forgery in either case. With the "by" present, the word "Trustee" becomes just surplusage.[13] Without "by", the word "Trustee" likewise shows that the writing is Gilbert's, not Bartfields', and therefore not forgery.

The court below states (R. 128) that the Bartfields testified that their signatures were not notarized, although it did concede (*ibid.*) that the Bartfields affirmed that the signatures were theirs. Again, what difference does it make whether the signatures were notarized?[14] There is no requirement in California that a power of attorney be acknowledged. The only effect of acknowledgment is that, if acknowledged, the instrument may be recorded (Calif. Govt. Code 27287) and thus give constructive notice to others (Calif. Civil Code 1213). But there is no require-

[13] So as to facilitate the bank clerks in determining into which account to deposit the check (R. 55, 58, 63).

[14] Incidentally, the place on the power of attorney form is what is known as an acknowledgment which is a statement by a notary that the persons acknowledged *having executed* the instrument (Calif. Civil Code 1185). It is not, like a verification (Calif. Code of Civil Procedure 446) or an affidavit (Calif. Code of Civil Procedure 2003), a statement under oath and signed in the presence of a notary.

ment that to be valid a power of attorney need be recorded.[15] And an unrecorded (Calif. Civil Code 1217) or an unacknowledged (*West* v. *Mears*, 17 Cal. App. 718, 121 Pac. 700) instrument is valid between the parties. Moreover, there is no contention that the power of attorney here involved was recorded and the instrument shows on its face that it was not.

There are other statements by the court in its effort to sustain the conviction which likewise do not support it. These statements are (R. 128) that the jury might have found:

1. that the signatures of the Bartfields on the power of attorney were forgeries. We respectfully submit that when a person affirms that a signature is his, it cannot be a forgery.

2. that the power of attorney was unnotarized and incomplete before delivery. Even if unnotarized, as we have pointed out above, that is utterly immaterial. And to suggest that the instrument was incomplete before delivery is without foundation in the record. It is just a guess, hardly enough to sustain criminal conviction.

3. that the instrument was executed in blank. Here again, there is just no evidence to support such a conclusion.

4. that it was executed with no specific power to endorse checks on the theory that the provision for endorsement was inserted *after* the original drafting by use of a caret. There is just no evidence to support the conclusion that

[15] This is true even if the power of attorney concerns real property (Calif. Civil Code 1216).

the insertion of the word "endorsing" occurred after the original drafting.[16]

If the jury drew these conclusions, as the court below said it might (R. 128), then, in truth the convictions were made out of thin air—by guess and speculation—not by evidence. "Speculation and intuition cannot be substituted for proof." (*United States* v. *Pechenik*, 236 F. 2d 844, 847 [CA 3 1956]).

This is truly a case where injustice has been done and a mistake made (*United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395). It is obvious (R. 109) that the court below had little sympathy for petitioner.[17] But that is neither here nor there. The conviction was obtained in the absence of evidence and so is a denial of due process calling for correction by this Court. *Thompson* v. *Louisville*, 362 U.S. 199, 206:

> ". . . Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a viola-

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[16] What evidence there is on this matter is the testimony of petitioner. (It will be noted that, to make crystal clear the absence of evidence to support the conviction, petitioner has not relied at all upon the evidence he introduced in putting on his case.) R. 60:

"Q. When did you put this writing on this power of attorney?

"A. At the time I prepared it.

"Q. When was that?

"A. April 10, '57.

"Q. When did you insert the little word 'endorsing'?

"A. At the precise time after I wrote it. I wrote it and I read it and put that in."

Even if the word "endorsing" were not in the power of attorney, the remaining language (R. 106) ("receiving, depositing . . . and otherwise negotiating such refund checks at his sole discretion, including the right of offset") is certainly broad enough to authorize the endorsement.

[17] It even thought he was guilty of the counts as to which the jury had acquitted (R. 109).

tion of due process to convict and punish a man without evidence of his guilt."

Conclusion

The convictions on counts 21 and 22 should be reversed and the counts ordered dismissed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 478

R. MILO GILBERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 108–125) is reported at 291 F. 2d 586. The court's order on petition for rehearing (R. 127–129) is reported at 291 F. 2d 597.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1961 (R. 126). A petition for rehearing was denied on May 19, 1961 (R. 129). The petition for a writ of certiorari was filed on June 19, 1961, and granted on October 9, 1961, 368 U.S. 816. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction of forgery in fraud of the United States was supported by the evidence.

2. Whether petitioner's conduct constituted forgery within the reach of 18 U.S.C. 495, punishing frauds against the United States.

STATUTE INVOLVED

Section 495 of Title 18 U.S.C. provides as follows:

> Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or
>
> Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or
>
> Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited—
>
> Shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

STATEMENT

Petitioner, an accountant, was charged by an indictment in thirty-five counts with offenses arising

out of his preparation of federal income tax returns for various persons (R. 1–16). Taken as a whole, the indictment charged petitioner (in the words of the court below, R. 108–09) with having pursued

> a steady plan of falsifying his clients' returns by adding income tax deductions not incurred or claimed by them to their returns after they had signed them, requesting a refund from the government in the clients' names, and pocketing the same, allegedly by forging a client's name, *i.e.*, cashing the government checks by endorsing the checks as trustee for the payees, which he was not, either in fact or law.

After a jury trial in the United States District Court for the Southern District of California, he was convicted on counts 4 to 34, inclusive, and acquitted on the remaining counts (R. 21–22). Consecutive sentences of one year on each count were imposed, together with a fine of $5,000 on counts 4 through 11 and 23 through 34 (R. 24–26).

On appeal, the court below found that there was "more than sufficient evidence" to support petitioner's conviction on each count, "if all such evidence were properly admissible" (R. 109). However, the court concluded that the evidence used by the government in support of the convictions on all counts except 21 and 22 had been obtained by an invalid search (R. 116–25). It therefore reversed as to all but those two counts and remanded the proceeding for a new trial. After separately examining the evidence supporting the convictions under counts 21 and 22, it found that "there is beyond question substantial evidence to support" petitioner's convictions under them (R. 115–

116) and affirmed as to those two counts (R. 125). It also denied a petition for rehearing directed to the convictions under those two counts (R. 127–29).

Count 21 of the indictment charged that on or about June 2, 1958, petitioner had "knowingly and wilfully forged" on a United States Treasury check in the amount of $848.11 the endorsement of the payees, Daniel H. and Charline[1] R. Bartfield "for the purpose of obtaining and receiving said amount from the United States, its officers and agents" (R. 11). Count 22 charged that on the same date petitioner had "knowingly and wilfully forged" another such check payable to the same payees, in the amount of $556.04, for the same purpose (*ibid.*). The evidence pertaining to these two counts may be summarized as follows:

Mr. Bartfield testified that petitioner, R. Milo Gilbert, had assisted him and his wife in making out their federal income tax returns for 1955 and 1956 (R. 41–42; Gov. Exs. 33, 34, R. 89–103). The record contained an "Application for Tentative Carryback Adjustment" relating to those two years, which had been prepared by petitioner, and which showed the taxpayers' address as being "c/o R. Milo Gilbert, 519 Taft Building, Hollywood 28, California" (R. 95–96). Mr. Bartfield testified that he had never authorized petitioner to use such an address as his home address

[1] The check involved in count 22 was erroneously made out to Daniel H. & "Chairene" R. Bartfield (R. 87), and this typographical error was carried over into both counts of the indictment (R. 11). The check involved in count 21 was made out to Daniel H. & "Charlene" R. Bartfield (R. 83).

and that he had never authorized petitioner to have any tax refund checks made payable to Bartfield and sent to petitioner (R. 42). Mrs. Bartfield testified that she had never authorized petitioner to receive any tax refund checks made payable to her (R. 47).

The record reflected that carryback adjustments to the Bartfields' returns were allowed by the Internal Revenue Service (R. 91, 95–96) and that two United States Treasury checks marked "Tax Refund" were issued (R. 83, 87). These checks, on which counts 21 and 22 are based, were made out in the following form (R. 83, 87):

> DANIEL H & CHARLENE [2] R BARTFIELD
> % R MILO [3] GILBERT
> 519 TAFT BUILDING
> HOLLYWOOD 28 CALIF

Petitioner placed the following handwritten endorsement on both checks (R. 42–43, 83, 87):

> Daniel H. Bartfield
> Charline R. Bartfield
> R. Milo Gilbert, Trustee

Mr. Bartfield testified that he had never authorized petitioner to sign his name or to endorse his name on these checks (R. 43). He further testified that petitioner had never been his trustee, that petitioner had never been appointed as such in any legal proceedings, and that he had never stated to anyone that petitioner was his trustee (*ibid.*). Mrs. Bartfield testified that she had never authorized petitioner to sign these

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[2] See note 1, *supra*.

[3] On the check involved in count 22, the name "Milo" was incorrectly rendered as "Mile" (R. 87).

checks or any other checks (R. 47). She also testified that petitioner had never been her trustee, that he had never been appointed as such in any legal proceeding, and that she had never stated to anyone that he was her trustee (*ibid.*).

Mr. Bartfield testified that the first time he ever saw the two tax refund checks on which counts 21 and 22 are based was when "the Government men" brought them to his home and showed them to him (R. 43).

On cross-examination of Mr. and Mrs. Bartfield, the defense produced what purported to be a power of attorney executed by them in favor of petitioner (Def. Ex. M, R. 105–07).[4] This document was a printed "Power of Attorney" form bearing what appeared to be the signatures of Daniel H. Bartfield and Charline R. Bartfield, dated April 10, 1957, and appointing R. Milo Gilbert as their "true and lawful attorney" for certain purposes that were set forth in hand printing:

> For all matters pertaining to our Federal and California State Income Taxes and Tax Returns for the calendar years 1954 to 1957 inclusive. This includes the filing and signing of tax returns and all other necessary forms, such as extension of time, etc.; and the filing of necessary refund claims; and the receiving, depositing, endorsing[5] and otherwise negoti-

[4] A photostatic copy of this exhibit appears as an Appendix to this brief, p. 1a, *infra*. Only a printed transcription appears in the Transcript of Record before this Court.

[5] This word was inserted between the lines over a caret. See Appendix, p. 1a, *infra*. Petitioner testified that he made this insertion at the same time he drafted the rest of the document (R. 60).

> ating such refund checks at his sole discretion, including the right of offset. Furthermore, to make any compromises and settlements at his sole discretion, as he see fit and proper. Furthermore, to perform any further act as he may deem necessary under the circumstances.
>
> We further agree to hold said R. Milo Gilbert harmless for any and all acts committed.

The document also bore a certification that Mr. and Mrs. Bartfield had appeared before one Ruth Gilbert, a notary public whom the record showed to have been petitioner's wife (R. 60), and acknowledged that they had executed the power of attorney.

Mr. Bartfield testified that the first signature on the power of attorney appeared to be and probably was his signature, but that he could not remember petitioner's ever having asked him to sign a power of attorney and that he could not remember having signed it (R. 43–45). He testified that, while he knew Mrs. Gilbert, he had never appeared before her to acknowledge signing a power of attorney (R. 46, 45). Mrs. Bartfield testified that the second signature on the power of attorney appeared to be and probably was her signature,[6] but that petitioner had never asked her to sign a power of attorney (R. 48, 49). She testified that she had never met Mrs. Gilbert and had never appeared before her (R. 48–49).

Petitioner testified that he followed a general practice of requiring that his clients sign powers of attorney authorizing him to negotiate any refund checks (R. 54). He stated that his purpose in doing so was

[6] Mr. Bartfield also testified that the second signature looked like his wife's signature (R. 44).

to enable him to deposit the checks in his "trustee account" in the bank (*ibid.*). He testified that, when a refund check would come in, he would "call the client and tell him that I had received it—well, maybe not at this time * * *." (R. 55.) He would then deposit the check in a trustee account (*ibid.*). Petitioner stated that it was his usual practice not to disburse these funds until December, because he wanted to guard against the possibility that the client would spend the money and then not have it, if it should become necessary to return some of it to the government (R. 56). He testified that he customarily explained this procedure to his clients when he prepared their returns and told them that, unless they agreed to have refund checks come to his office, he did not want to handle their cases (R. 55). Petitioner indicated that his reason for having refund checks come to his office was that his fees were charged on "a contingency basis" (R. 56).

The trial court denied petitioner's motion for a directed verdict, stating that the statute under which he was being tried, 18 U.S.C. 495, "is very broad" (R. 62, 66). The court also refused to give instructions requested by the defense to the effect (*inter alia*) that one who, without authority, "executes an instrument purporting on its face to be executed by him as agent of a principal named therein" is not guilty of forgery, and that a check endorsed "name of payee by other as trustee" does not constitute a forged instrument (R. 20, 66). The jury found petitioner guilty on counts 21 and 22 (R. 21–22). In affirming petitioner's conviction on those two counts,

the court of appeals held that the evidence as to whether the Bartfields had authorized petitioner to endorse their refund checks presented an issue of credibility for determination by the jury (R. 116), that the jury's verdict on those counts was supported by substantial evidence (*ibid.*), and that petitioner's signature in a trustee capacity not possessed by him was the signature of a fictitious person and therefore a forgery (R. 115).

SUMMARY OF ARGUMENT

1. Petitioner, who was indicted and convicted of forging endorsements on two United States Treasury checks in violation of 18 U.S.C. 495, admitted that he had made the endorsements. The evidence as to the only contested issue of fact, whether he was authorized to endorse the payees' names on the checks, was in conflict, and the question was properly submitted to the jury. The jury's determination of that issue was amply supported by the evidence, and the evidence also supported the jury's inference that petitioner's conduct was knowing, wilful, and with a purpose to obtain money from the government. Accordingly, he was properly found guilty of forgery in fraud of the government in violation of 18 U.S.C. 495.

2. Petitioner contends that, even if he was without authority to endorse the checks, his conduct did not constitute "forgery" because the endorsements disclosed on their face that he had made them in a representative capacity. However, an examination of the endorsements establishes that they do not in any

sense indicate that petitioner signed them as the payees' agent. While it was assumed in the court below and in this Court upon the petition for a writ of certiorari that the endorsements did contain the word "by," which might suggest an agency relationship, it is now clear that no such word is present. There is thus no factual basis for petitioner's theory, and the conviction should be affirmed.

Even if petitioner's endorsement did import an agency relationship, he is guilty of forgery against the government in violation of 18 U.S.C. 495. That statute was enacted, not as a federal forgery law, but for the purpose of protecting the government against all forms of fraudulent writings. Its context, history and manifest purpose dictate that the forgery it proscribes should be broadly construed to comprehend unauthorized writings even where they purport to be authorized. The general case law supporting a narrower construction has no application to this federal legislation for the protection of the national government.

The court of appeals affirmed on the alternative theory that petitioner's placing his own signature on the checks as "Trustee" was a forgery because it was the signature of a fictitious person. Petitioner was not and had never been the payees' trustee. His assumption of a legal status he did not possess was just as much a forgery as his assumption of a name he did not possess would have been. His conviction on this alternative theory was therefore properly affirmed by the court below.

ARGUMENT

Petitioner was convicted of forgery in violation of 18 U.S.C. 495, for having endorsed two government checks with the names of the payees, followed by his own name and the word "Trustee." We show in our first point that the only contested question of fact—whether petitioner was authorized to endorse the payees' names on the checks—was properly submitted to and determined by the jury. However, petitioner contends that, even if he was not actually authorized to make the endorsements, his conduct did not constitute forgery, because the endorsements disclosed on their face that petitioner had signed the payees' names in a representative capacity. In our second point, we show that the endorsements did *not* import any agency relationship between petitioner and the payees (for which reason the primary basis for this Court's granting certiorari may have disappeared); and that, even if they did disclose such a relationship on their face, they fell within the purview of 18 U.S.C. 495.[7]

I. THE EVIDENCE SUPPORTS THE JURY'S CONCLUSION THAT PETITIONER WAS WITHOUT AUTHORITY TO ENDORSE THE CHECKS

Petitioner conceded that he had himself endorsed the signatures of Daniel H. Bartfield and Charline R. Bartfield, the payees of the United States Treasury checks involved in this case, on the backs of the

[7] We also show that the "Trustee" endorsement was a forgery in that it was the signature of a fictitious person.

checks (R. 42–43).[8] With this crucial issue thus disposed of, the only contested question of fact standing between petitioner and a conviction for forgery in violation of 18 U.S.C. 495 was whether he had been authorized to make those endorsements. The evidence on this issue was in sharp conflict.

The payees, Mr. and Mrs. Bartfield, stoutly denied that they had ever authorized petitioner either to receive or to endorse their names on tax refund checks (R. 42, 43, 47). Petitioner introduced into evidence what purported to be a power of attorney signed by Mr. and Mrs. Bartfield authorizing petitioner to take various actions in connection with their federal income tax returns, including "receiving, depositing, endorsing and otherwise negotiating" refund checks (R. 105–07; Appendix, p. 1a, *infra*). The face of the document disclosed that the word "endorsing" had been inserted between the lines,[9] and the document bore a certification that Mr. and Mrs. Bartfield had appeared before petitioner's wife and acknowledged that they had executed the power of attorney (*ibid.*). However, although conceding that the signatures on the power of attorney were probably theirs, the Bartfields denied that petitioner had ever asked them to sign a power of attorney and could not remember having signed such a document (R. 43–45, 48, 49). Moreover, they flatly denied ever having appeared

[8] Nor does petitioner question that the forgery of an endorsement on a government check violates 18 U.S.C. 495. *Prussian* v. *United States*, 282 U.S. 675; *Conklin* v. *Cozart*, 158 F. 2d 676 (C.A. 5), certiorari denied, 332 U.S. 801.

[9] This insertion was not initialed (see Appendix, p. 1a, *infra*).

before petitioner's wife to acknowledge having signed a power of attorney (R. 45, 48–49).[10] Although petitioner testified that it was his general practice to have his clients execute a power of attorney authorizing him to deal with refund checks (R. 54), he did not testify specifically concerning the Bartfield power except to state that he inserted the word "endorsing" at the time he prepared the rest of the power (R. 59–60).

As the court below observed, this evidence "presents a question of credibility" (R. 116) that was correctly submitted to the jury. It was presented to them with proper instructions on the law relating to authority and agency (R. 75). The jury determined that petitioner was without authority to endorse Mr. and Mrs. Bartfield's names on the government checks and was therefore guilty of forgery (R. 21–22). It was plainly within the province of the jury so to conclude.

Weighing the conflicting testimony, the jury was entitled to infer, in view of the Bartfields' inability to remember ever signing or even discussing a power of attorney, that petitioner submitted the power to the Bartfields under the guise of another document.[11] Or the jury might justifiably have inferred that petitioner induced the Bartfields to execute the power in

[10] Mr. Bartfield testified that he knew petitioner's wife (R. 46), but Mrs. Bartfield denied ever having even met her (R. 49).

[11] The record does not negate the possibility that the power of attorney was a forgery, although there is no affirmative evidence to that effect.

blank, or that he added the authority to "endorse" after they had signed it. Moreover, while the absence of an acknowledgment would not legally invalidate a power of attorney, the Bartfields' unequivocal challenge to the truthfulness of the acknowledgment appearing on the power cast over the entire document a cloud that the jury was entitled to take into account in appraising its authenticity. The jury was under no obligation to accept any part of petitioner's version of the contested facts.[12]

The evidence supported the jury's resolution of the other elements of the offense for which petitioner was indicted—that the forgery of these two government checks was knowing and wilful and that it was done for the purpose of obtaining money from the United States. The jury could properly infer the requisite state of mind and purpose, not only from the circumstances of the unauthorized endorsement, but from petitioner's having had the refund checks sent

[12] Since the issue of authority was for the jury and was properly submitted to them, the court of appeals' characterization of the evidence on the subject (R. 116, as amended on rehearing, R. 127; discussed at Pet. Br., p. 18) has no significance other than as holding that there was "no adequate or convincing proof" of authority such as to require the court to upset the jury's verdict.

Petitioner also points out (Pet. Br., pp. 18–19) that the court below, in its order on rehearing, referred to "the fraudulent returns which were the basis of the refunds" (R. 128). Petitioner is correct in observing that, although the indictment charged fraud with respect to other counts (see Pet. Br., p. 8), there was no charge or evidence that the Bartfield returns were fraudulent. However, the court's remark on rehearing was unnecessary to its decision, since the authority issue was properly submitted to and decided by the jury.

to him without the Bartfields' authority or apparent knowledge (R. 42, 47), and from his having concealed from the Bartfields their receipt, endorsement and deposit in his own account so that they did not know of the checks until shown them by government agents (R. 43). In short, this case was properly submitted to the jury, and the jury's determination of petitioner's guilt was, as the court of appeals found (R. 116) and reaffirmed on rehearing (R. 128), "beyond question" supported by "substantial evidence."

II. PETITIONER'S CONDUCT CONSTITUTES "FORGERY" IN VIOLATION OF 18 U.S.C. 495

Petitioner's primary contention in this Court is that, even if his lack of authority to endorse these government checks be conceded, his signing the payees' names did not constitute "forgery." The ground for this contention is that each of his endorsements allegedly disclosed on its face that petitioner was endorsing the check in a representative capacity and that, under the prevailing law, such an endorsement does not constitute a forgery even though the signer does not in fact have the authority claimed. The short answer to this contention is that, although it had some colorable basis on the factual assumptions entertained in the court below and upon the petition for a writ of certiorari, it is now clear that in fact the endorsements disclosed no agency relationship on their face. Moreover, the reach of the forgery provision of 18 U.S.C. 495 is sufficiently broad to reach wilful misrepresentations of authority to sign other people's names.

A. THE ENDORSEMENTS DID NOT DISCLOSE AN AGENCY RELATIONSHIP ON THEIR FACE

Petitioner admittedly endorsed the two government checks at issue by signing, on separate lines, the name of each of the payees and then his own name, followed by the word "Trustee," thus (R. 42–43, 83, 87):

Daniel H. Bartfield
Charline R. Bartfield
R. Milo Gilbert, Trustee

The handwriting of these signatures was not such as to compel the conclusion that they had all been written in the same hand. It seems perfectly apparent that there is nothing about these signatures that would indicate, either as a matter of law or as a matter of fact, that one person signed for the other two in a representative capacity.

The most likely conclusion that a person viewing such an endorsement would draw is that the Bartfields, who were the only true payees named on the face of the checks, had endorsed and turned them over to petitioner, and that petitioner had in turn made his endorsement preliminary to depositing them, adding the word "Trustee" to indicate in which of his bank accounts he wished to have the checks deposited.[13] Indeed, petitioner has admitted that the *only* purpose the addition of the word "Trustee" was

[13] This hypothesis is not altered by the fact that petitioner's name appears as a part of the payees' address on the obverse side of the check. That fact might suggest to the viewer that some sort of agency relationship actually existed between petitioner and the Bartfields, but it would in no way suggest that petitioner *had signed the Bartfields' names* in a representative capacity.

intended to serve was *not* to indicate an agency relationship but "to facilitate the bank clerks in determining into which account to deposit the check" (Pet., p. 10, n. 7; R. 63; see also Pet. Br. p. 20, n. 13; R. 54). Under the circumstances, it is difficult to see how petitioner can now seriously contend that his employment of that word transformed the endorsement into one disclosing an agency relationship on its face.

Of course, this case is entirely different from the many cases cited by petitioner in which an agency relationship *was* disclosed on the face of the endorsement. Clearly enough, an endorsement of the payee's name "by" the actual signer—the factual situation erroneously assumed to obtain in this case before the court of appeals and in this Court upon the petition for a writ of certiorari—shows a purported agency relationship on its face. See, *e.g., Selvidge* v. *United States,* 290 F. 2d 894 (C.A. 10) (cited Pet. Br., p. 12). The same would be true of an endorsement in the signer's own name "per pro." the payee. See, *e.g., In re Tully,* 20 Fed. 812 (S.D.N.Y.) (cited Pet. Br., p. 10). Similarly, where the payee or prior endorser is a corporate entity that can act only through agents, the signature of a natural person will import an agency relationship, see, *e.g., Peoples Bank* v. *International Finance Corp.,* 30 F. 2d 46 (C.A. 4) (cited Pet. Br., p. 10); *Torrance Nat'l Bank* v. *Aetna Casualty & Surety Co.,* 251 F. 2d 666 (C.A. 9) (cited Pet. Br., p. 11), even if no title (such as "Cashier" or "Treasurer") is set forth, see, *e.g., Greathouse* v. *United States,* 170 F. 2d 512 (C.A. 4) (cited Pet. Br., p. 11); *Dexter Horton Nat'l Bank*

v. *United States F. & G. Co.*, 149 Wash. 343, 270 Pac. 799 (cited Pet. Br., pp. 16–17 and n. 10).

But those cases are not this case. The endorsement petitioner placed on the government checks simply cannot be read as importing any agency relationship, nor (as petitioner has conceded) was it intended to do so. It is true, of course, that in the court below both petitioner and the government erroneously assumed that the checks were endorsed with the payees' signature "*by* R. Milo Gilbert, Trustee," and the court below labored under the same misapprehension (see R. 115). Similarly, in this Court upon the petition for a writ of certiorari, both the petitioner and the government mistakenly assumed that the endorsement contained the word "by" (Pet., p. 4; Gov. Br. Opp., p. 3); presumably it was upon this assumption that the Court granted the writ.

The facts are now known to be otherwise.[14] Petitioner concedes (as the checks themselves plainly disclose, R. 83, 87) that the word "by" does *not* appear in the endorsement (Pet. Br., p. 5). There is no basis for assuming that the trial court or the jury was under any misapprehension on this score; they had the actual checks before them and could see for themselves how the endorsement read (see R. 42–43, 47;

[14] It appears that the original checks were mislaid some time after the trial. Their absence from the record was not noticed (largely because the precise language of the endorsement was not critical under the theory on which the court of appeals based its decision) until called to the parties' attention by the Clerk of this Court after the writ was granted.

Pet. Br., p. 5, n. 4).[15] And, of course, the fact that the court of appeals considered and decided the case on the basis of a factual assumption *less* favorable to the government than the true facts would not justify ignoring the true facts;[16] plainly enough the court below would regard the case in its true factual posture as an *a fortiori* case.[17]

And yet the petitioner continues to present this case to the Court as if the word "by" were (*e.g.*, Pet. Br., p. 3) or might be (*e.g.*, Pet. Br., pp. 7, 20) in the endorsement, or as if it made no difference one way or the other (*e.g.*, Pet. Br., p. 5, n. 4). As we show below, the presence or absence of the word "by" in the endorsement does *not* make any difference, although not for the reason petitioner suggests, but because the crime of forgery against the government under 18 U.S.C. 495 embraces misrepresentations as to authority as well as spurious signatures. But under petitioner's theory (expounded at Pet. Br., pp. 9–17)—that endorsements showing on their face that they were made by the signer in an alleged representative capacity do not constitute forgery—the absence

[15] Petitioner's suggestion (Pet. Br., p. 5, n. 4) that the trial judge was under a misapprehension is without foundation. The judge's references to an endorsement containing the word "by" were not related to counts 21 and 22 and are explained by the fact that there were other counts involving checks whose endorsement *did* contain the word "by."

[16] Had the court reversed the judgment, an erroneous concession of the facts might have been binding upon the government, but such was not the case.

[17] The same would be true with respect to the trial court if (as has not been shown to be the case) it had been mistaken concerning the form of the endorsement on the checks involved in counts 21 and 22. See note 15, *supra*.

of the word "by" is critical. Without it, the endorsements of the payees' names are robbed of the slightest pretense that they were made by petitioner in a representative capacity. Accordingly, petitioner's convictions under counts 21 and 22 can properly be affirmed without any consideration of the full reach of 18 U.S.C. 495.

B. EVEN IF THE ENDORSEMENTS DISCLOSED AN AGENCY RELATIONSHIP, THEY CONSTITUTED FORGERY UNDER 18 U.S.C. 495

The theory on which the trial court submitted this case to the jury made it unnecessary for the court to determine (or to ask the jury to determine) whether the endorsements petitioner placed on the government checks disclosed an agency relationship on their face. The court found that the statute punishing forgeries practiced on the government, 18 U.S.C. 495, "is very broad" (R. 62)—indeed, "one of the broadest statutes," and necessarily so because of the difficulties the government encounters in protecting itself against forgeries of the great volume of checks it must issue (R. 63). Accordingly, the court concluded that an endorsement disclosing any agency relationship on its face (as, for example, through the word "by," R. 63, 64) would be a forgery under this statute if it were not in fact authorized by the payee (R. 66). In view of the history and manifest purpose of 18 U.S.C. 495, that conclusion was clearly correct. Since the jury found petitioner to have been without authority to endorse the Bartfields' signatures on the government checks at issue here, his conviction should be affirmed even if those endorsements be viewed (as we contend they cannot be) as openly and plainly

implying that he was acting in a representative capacity.

In pertinent part, 18 U.S.C. 495, under which petitioner was indicted and convicted for having "knowingly and wilfully forged" an endorsement on a United States Treasury check "for the purpose of obtaining and receiving" money "from the United States, its officers and agents,"[18] provides that

> Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money * * *

is guilty of a felony. Two succeeding paragraphs of Section 495 punish the uttering or publishing of any such writing as true, and the transmission or presentation of any such writing to the government with intent to defraud it.[19] The statute thus deals in the broadest and most comprehensive terms with all forms of frauds that might be perpetrated upon the federal government by means of writings.

That the statute was enacted, not simply as a federal forgery statute, but for the primary purpose of protecting the government against frauds by writing is apparent, not only from its context and comprehensiveness, but from what little of its history is

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[18] Counts 21 and 22 disclosed on their face that they were brought under 18 U.S.C. 495 (R. 11).

[19] See p. 2, *supra*.

known. The statute was originally enacted in 1823. Its first section provided (3 Stat. 771)

> That if any person or persons shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged or counterfeited; or willingly aid or assist in the false making, altering, forging, or counterfeiting, any deed, power of attorney, order certificate, receipt, or other writing, for the purpose of obtaining or receiving, or of enabling any other person or persons, either directly or indirectly, to obtain or receive, from the United States, or any of their officers or agents, any sum or sums of money * * * every such person shall be deemed and adjudged guilty of felony * * *.

Thus, while unnecessarily detailed by modern standards, that Act spoke just as broadly when first enacted as it does today. As in its present form, this section also punished the uttering or publishing and transmission or presentation of such writings. A second section punished knowing possession of such writings[20] and contained the proviso "That nothing herein contained shall be construed to deprive the courts of the several states of jurisdiction, under the laws thereof, over offences declared punishable by this law."

While no debates or reports on the bill were published, its character is apparent from its title as enacted, "An Act for the punishment of frauds com-

[20] This provision was subsequently eliminated as an unnecessary duplication of the preceding section. See 42 Cong. Rec. 730.

mitted on the government of the United States" (see 3 Stat. 771), which remained substantially the same throughout the various stages of its consideration. 40 Annals of Congress 188, 200, 290, 320, 1015, 1144, 1146, 1157, 1161 (1823). Moreover, that its central purpose was not to make forgery and similar conduct federal offenses but rather to protect the federal government against frauds is underlined by the proviso to the second section, which emphasizes that, to the extent that the proscribed crimes against the government are also offenses under the ordinary criminal laws of the states, they may be punished by the latter as well.

From the foregoing, it seems fair to infer that the Congress which passed this statute would have intended that the "forgery in fraud of the government" proscribed by it should be broadly construed. It would have been expected that the offense would be measured in relation to the manifest legislative purpose of fully and effectively protecting the federal government against all forms of fraud by writing, cf. *United States* v. *Turner*, 7 Pet. 132, 136 (1832), not simply to a purpose of enforcing the ordinary forgery laws, which it left to the states.

That the Congress which enacted the progenitor of 18 U.S.C. 495 must have intended "forgery" in violation of its terms to be broadly construed is further evidenced by the fact that the concept of forgery had a very broad meaning in the early nineteenth century when this statute was enacted. While no American authorities have been found that cast any light on the subject, the English writers without ex-

ception defined "forgery" as comprehending any alteration of a writing, for fraudulent purposes, that gives an appearance of truth to a falsity. Thus, Lord East, who wrote the most extensively on this subject of any writer of that time, 2 East, *Pleas of the Crown* 852 (1803), said:

> *Forgery* at common law denotes a *false* making (which includes every alteration of or addition to a true instrument), a making *malo animo*, of any written instrument for the purpose of fraud and deceit. This definition results from all the authorities ancient and modern taken together. * * *

See also, *e.g.*, 1 Hawkins, P.C., ch. 70, Sec. 2; 3 Coke, Inst. 169; 4 Blackstone, Comm. 247.

What appears to have been the first authoritative construction of the progenitor of 18 U.S.C. 495 confirms the view that "forgery" within its terms was intended to be broadly construed. In 1839, the court in *United States* v. *Osgood*, 27 Fed. Cas. No. 15,971a at p. 363 (C.C.S.D.N.Y.), defined "forgery" as

> the false making of a paper. This false making need not be the entire fabrication of the paper; any addition to a genuine paper, or any alteration of it in an essential particular, so as to give it a different importance and meaning, is a forgery; and if this change is made for the purpose of defrauding the government, it is a felony, the crime interdicted by the statute. * * *

It seems quite clear that petitioner's conduct would fall within either this definition or those of the contemporaneous English writers.[21] For even if his en-

dorsement be considered as containing an implicit claim of authority to sign the payees' names to these government checks, that claim was, as the jury found, false and fraudulent, an attempt to give an appearance of truth to what was a fabrication (*i.e.*, that he had authority).

The Act of 1823 has come down to us virtually unchanged, and none of the changes[22] has modified its central purpose of punishing frauds against the government. It is true that, while the Revised Statutes of 1873–74 placed this provision (Section 5421) in Chapter 5, "Crimes Against the Operations Of The Government," and the Criminal Code of 1909 placed it (Section 29, 35 Stat. 1094) under a similar heading, the present Criminal Code places it in Chapter 25, "Counterfeiting and Forgery." However, no change in the substance of the legislation was thereby intended, see 42 Cong. Rec. 858; see also *id.* at 655–66, 730, and superficial changes in the arrangement of a statute do not change or limit its originally intended scope.

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[21] This Court first construed the progenitor of 18 U.S.C. 495 in *United States* v. *Staats*, 8 How. 41 (1850). The Court there held that the third clause, punishing the transmission and presentation of fraudulent writings, comprehended a false affidavit attached to a claim against the government. In dictum, the Court suggested that such a broad construction "probably" would not be applicable to the first clause, punishing the actual making of fraudulent writings, 8 How. at 46. There does not seem to be any basis for such a distinction, nor is there any reason to suppose that even the Court's "narrower" construction of the first clause would not comprehend petitioner's conduct.

[22] The word "contract" was later added to the writings specifically named, the penalty clause was modified, and the phraseology of the provision was considerably simplified.

See, *e.g.*, *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, 379–80.

While the statute punishing forgeries practiced upon the government has not changed since the early nineteenth century, the common law of forgery has been modified. In *Regina* v. *White*, 2 Car. & K. 404 (1847) (cited Pet. Br., p. 10), a restrictive qualification was written into the definition of forgery. There the conviction of a clerk who had endorsed a bill of exchange by writing "Per procuration, Thomas Thomlinson" (his former employer), and then adding his own name, was reversed without discussion. The mischief of this decision was soon recognized, and Parliament passed the Forgery Act of 1861, 24 & 25 Vict., c. 98, sec. 24, which defined forgery to include the act of signing the name of another "per procuration" without authority or excuse and with the intent to defraud.[23] However, the doctrine of *Regina* v. *White* had already taken root in the United States, see, *e.g.*, *In re Tully*, 20 Fed. 812 (S.D.N.Y.) (cited Pet. Br., p. 10), and has flourished despite its having been disowned in the parent country.

Although this restrictive view of "forgery" under the common law and ordinary forgery statutes has become the majority view in this country, a number of courts, particularly federal courts, have wisely refused to follow it. See, *e.g.*, *Ex parte Hibbs*, 26 Fed.

[23] The statute now in effect in England, the Forgery Act of 1913, 3 & 4 Geo. 5, c. 27, sec. 1(2), provides that a document is forged "if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it nor authorise its making * * *."

421, 432–34 (D. Ore.); *Yeager* v. *United States*, 32 F. 2d 402 (C.A.D.C.);[24] *United States* v. *Tommasello*, 64 F. Supp. 467 (E.D.N.Y.);[25] *Security Nat'l Bank of Durand* v. *Fidelity & Cas. Co. of New York*, 246 F. 2d 582 (C.A. 7). In *Quick Service Box Co.* v. *St. Paul Mercury Indemnity Co.*, 95 F. 2d 15, 17 (C.A. 7), the court said:

> The essence of forgery does not so much consist in counterfeiting as in endeavoring to give appearance of truth to a mere deceit and falsity * * *. In other words, if the deceit consists in making it appear that a man's own act was done under circumstances which would make it genuine, when in fact it was false and unauthorized, the result is the same. * * *

However, there appears to have been no direct ruling upon the question whether an endorsement purportedly authorized but in fact not authorized would constitute a forgery in violation of 18 U.S.C. 495 prior to the decision of the Court of Appeals for the Tenth Circuit in *Selvidge* v. *United States*, 290 F. 2d 894, in 1961. There, the defendant had endorsed a United States Treasury check with the name of her employer and then added her own name as follows: "By Thelma L. Selvidge." She was convicted of a violation of 18 U.S.C. 495, but the court of appeals reversed, holding that "the unauthorized endorsement did not constitute forgery." 290 F. 2d at 895.

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[24] Especially as explained in *Kenney* v. *North Capitol Savings Bank*, 61 F. 2d 521 (C.A.D.C.).

[25] This case arose under 18 U.S.C. 494, which has been described as a "companion" to 18 U.S.C. 495, such that identical canons of construction are applicable to the two statutes. See *Pina* v. *United States*, 165 F. 2d 890, 894 (C.A. 9).

We respectfully urge that the *Selvidge* case was erroneously decided. The court relied almost entirely upon state forgery cases, see 290 F. 2d at 895–96, n. 1; it assumed that the ordinary forgery involved in those cases was identical with the forgery in fraud of the government punished by 18 U.S.C. 495. It refused to follow the decisions of other federal courts in the *Hibbs, Yeager, Tommasello* and *Quick Service Box* cases, *supra,* see 290 F. 2d at 896 and n. 2. Most important, the court gave no consideration whatsoever to the statute it was construing, nor to its manifest purpose to protect the government against fraudulent writings.

We emphasize once more that there is nothing about the endorsement petitioner placed on the government checks to suggest that he had signed the payees' names in a representative capacity. Hence, neither the *Selvidge* case, *supra,* nor any of the authorities petitioner cites in support of his theory of "forgery" has any application.[26] But even if this case be considered as if a person receiving these checks would somehow be put on notice that petitioner had signed them in an alleged representative capacity, petitioner is guilty of violating 18 U.S.C. 495. The congressional purpose effectively to protect the government against all forms of fraud that might be practiced upon it militates against a narrow and restrictive construction of the "forgery in fraud of the government" condemned by this statute. As the jury found, petitioner, with fraudulent purpose and without author-

[26] See pp. 17–18, *supra.*

ity, endorsed these United States Treasury checks with the payees' names. Such conduct makes out the offense of forgery under 18 U.S.C. 495, properly considered in the light of its history and manifest purpose.

C. THE ENDORSEMENT WAS ALSO A FORGERY BECAUSE IT WAS THAT OF A FICTITIOUS PERSON

Petitioner, after signing the payees' names to these United States Treasury checks without authority, signed "R. Milo Gilbert, Trustee." While petitioner's name was R. Milo Gilbert, there was no such legal person as R. Milo Gilbert, Trustee. The Bartfields denied that petitioner had ever been their trustee, that he had ever been appointed as such, or that they had ever referred to him as such (R. 43, 47). The purported power of attorney from the Bartfields to petitioner did not constitute him a trustee (R. 105–07; Appendix, p. 1a, *infra*), nor did he claim such a status in relation to the Bartfields in his testimony at the trial.

Thus, if petitioner's signing his own name as "Trustee" was anything more than the mere designation of a bank account,[27] it was, as the court below held (R. 115), a false endorsement in violation of 18 U.S.C. 495. The endorsement of a check with the name of a fictitious person constitutes forgery, see *Milton* v. *United States,* 110 F. 2d 556, 560–61 (C.A.D.C.); *Rowley* v. *United States,* 191 F. 2d 949, 951 (C.A. 8). To no less an extent, the assumption of a fictitious legal status is within the mischief to be

[27] And if that is all it was, it clearly cannot be said to import an agency relationship, see pp. 16–17, *supra.*

guarded against by the statute, cf. *United States* v. *Turner*, 7 Pet. 132, 136; *Logan* v. *United States*, 123 Fed. 291 (C.A. 6). One who is in fact a trustee acts as such in a wholly different capacity, and possesses greater powers and rights, than he does as a private individual; he is legally a different person.

Accordingly, one who seeks to defraud the government by claiming to be a legal person (*i.e.*, himself as trustee) who does not exist is just as guilty of forgery against the government as if he had claimed to be a natural person who did not exist. Indeed, the offense would seem to be the greater, for by assuming a fictitious status that carries with it the implication that he has been entrusted with fiduciary responsibilities, the forger greatly enhances his ability to deceive and defraud. The court below was correct in affirming upon this alternative theory that petitioner, by endorsing these checks in a trustee capacity which he did not possess, signed a fictitious name and was thus guilty of forgery against the government in violation of 18 U.S.C. 495.

CONCLUSION

Whatever legal theory is applied to the facts, they show that petitioner, without any authority whatsoever, falsely endorsed United States Treasury checks for the purpose of obtaining money from the government to which he was not entitled. He is thus guilty of forgery in fraud of the government, in violation of 18 U.S.C. 495. The judgment of the court below, sustaining his conviction on these counts, should be affirmed.

Respectfully submitted.

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MARCH 1962.

U.S. GOVERNMENT PRINTING OFFICE 1962

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Power of Attorney

SPECIAL

KNOW ALL MEN BY THESE PRESENTS: That we, Daniel H Bartfield And Charlene R Bartfield (husband and wife), the undersigned (jointly and severally if more than one), hereby makes, constitutes and appoints R Milo Gilbert his true and lawful attorney for him and in his name, place and stead and for his use and benefit:

(a) For all matters pertaining to our Federal and California State Income Taxes and Tax Returns for the Calendar years 1954 to 1957 inclusive This includes the filing and signing of Tax returns and all other necessary forms, such as extension of time, etc, And the filing of necessary Refund claims, and the Receiving, depositing, endorsing and otherwise negotiating such Refund checks at his sole discretion, including the Right of offset Furthermore, to make any Compromises and settlements at his sole discretion, as he see fit and proper Furthermore to perform any further acts as he may deem necessary under the circumstances

We further agree to hold said R Milo Gilbert harmless for any and all Acts committed.

GIVING AND GRANTING unto his said attorney full power and authority to do and perform all and every act and thing whatsoever requisite, necessary, or appropriate to be done in and about the premises as fully to all intents and purposes as he might or could do if personally present, hereby ratifying all that his said attorney shall lawfully do or cause to be done by virtue of these presents.

Wherever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

WITNESS his hand this 10th day of April, 19 57

Daniel H Bartfield

x Charlene R Bartfield

631872—62—(Face blank p. 32)

8 pt. type or larger

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } SS.

On April 10, 1957
before me, the undersigned, a Notary Public in and for said County and State, personally appeared
Daniel H. Bartfield And
Charlene R Bartfield

known to me to be the person S whose name S ARE subscribed to the within instrument and acknowledged that they executed the same.
WITNESS my hand and official seal.

(Seal) Ruth Gilbert
Notary Public in and for said County and State

SPACE BELOW FOR RECORDER'S USE ONLY

RUTH GILBERT
NOTARY PUBLIC IN AND FOR THE COUNTY
OF LOS ANGELES, STATE OF CALIFORNIA
My Commission Expires September 22, 1958.

Title Order No.

Escrow or Loan No.

WHEN RECORDED MAIL TO
R. Milo Gilbert
2747 North Lincoln St.
Burbank, Calif.

POWER OF ATTORNEY — SPECIAL

This standard form cannot meet every problem in the field indicated. Before you sign, read it, fill in all blanks,

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APPENDIX

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 478

R. MILO GILBERT,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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R. MILO GILBERT,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

Preliminary Statement

Respondent states in its conclusion (Br. 31):

> "Whatever legal theory is applied to the facts, they show that petitioner, without any authority whatsoever, falsely endorsed United States Treasury checks *for the purpose of obtaining money from the government to which he was not entitled . . .*" (italics added).

There is simply nothing in the record to sustain the italicized statement. The Government never claimed that the Bartfields were not entitled to the money the checks represented, and the Bartfields never claimed that petitioner

was not entitled to whatever portion of the checks he kept (R. 56) for his services.

The concluding statement in respondent's brief, quoted above, only compounds the error of its effort at the opening of its brief (p. 3) to cast the case pending before this Court as being one involving falsification of income tax returns by adding income tax deductions not incurred or not claimed by the taxpayers after they signed them and by pocketing the refunds. There are but two counts of the indictment (21 and 22 [R. 11]) before this Court. Whatever may be the correct facts as to the other counts of the indictment, as to the two counts in the case here, there is simply no problem of fraudulent return or refund application.[1]

It is enough to deal with the issues in the case before the Court without trying petitioner on other counts which have properly been reversed.

ARGUMENT

I.

The Evidence Is Insufficient (Reply to Respondent's Point I, pp. 11-15).

To say, as the Government does (Br. 11), that petitioner "conceded" that he endorsed the Bartfield names on the checks, is to suggest that there was, somehow, before the "concession" a claim or an argument by petitioner that he had not done so. This simply is not the case. The endorsements show on their face that they were made by petitioner; they were designed to, and did, so show to the

[1] Respondent eventually concedes this in its footnote 12, p. 14 of its Brief.

whole world and petitioner never claimed to the contrary. That petitioner signed the Bartfield names was stipulated to (R. 43, 47), not "conceded".

Respondent is incorrect in asserting (Br. 13) that the evidence "presents a question of credibility". The only witness whose testimony is involved is that of the Government's own witnesses, the Bartfields. Is it their credibility which is involved? Is it their conflicting testimony which the jury was supposed to resolve?

The confusion in the matter is demonstrated by Government counsel's questions in the trial court carried over in the Government's brief here. Referring to exhibits (33 and 34) which were not even introduced in evidence (R. 89, 97), trial counsel asked Mr. Bartfield (R. 42):

> "I call your attention to the top of these returns where it says 'Home Address, c/o R. Milo Gilbert, 519 Taft Building, Hollywood 28, California'. Did you ever tell Mr. Gilbert that that was your home address?"

To which Mr. Bartfield answered (R. 42): "No, sir." From this the Government argues here (Br. 4) that Mr. Bartfield never authorized petitioner to use such an address as his home address, inferring of course, that petitioner did something he was not supposed to do.

What are the facts?

Although the returns referred to were not introduced in evidence, the Government refers to them. An examination of the Bartfields' 1955 income tax return (part of Exhibit 33 for identification [R. 91]), shows on its face that petitioner had nothing to do with it.[2] And an examination of

[2] Exhibit 34 shows that petitioner did prepare the 1956 return (R. 99).

both the 1955 (R. 91) and 1956 (R. 99) income tax returns shows that the Home Address is *not* given as "c/o R. Milo Gilbert, etc." but in the 1955 return (R. 91) as "1142 S. Doheny Drive, Los Angeles 35" and in the 1956 return (R. 99) as "620 South Main Street, Los Angeles 14".

Why then the effort to infer that petitioner had somehow put in a different home address, namely his own office address, when the facts simply are to the contrary?[3]

And how can there be any question about the written power of attorney (Exh. M; R. 106-107) as a matter of law? Both the Bartfields testified that the signatures on the power of attorney were theirs. There just is no question about that.[4] The Government's effort to, without evidence, suggest that (Br. 13) petitioner submitted the power

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[3] If, as would seem to be the case, Government counsel in his questioning (R. 42) meant to refer to the Application for Tentative Carryback Adjustment (R. 95), that document does show the taxpayers' address, not *home* address, as petitioner's office, clearly, of course, for the purpose of correspondence concerning the application, the form showing on its face (R. 95) the addresses shown on the income tax returns as 1142 South Doheny Drive for 1954 and 1955, and 620 South Main Street for 1956. Both Mr. and Mrs. Bartfield signed this application showing these matters (R. 95).

[4] Mr. Bartfield was asked (R. 43-44): "I direct your attention, Mr. Bartfield, to Defendant's Exhibit M for identification, which contains the words at the top, 'Power of Attorney', and ask you if that is your signature on the left hand side?" Mr. Bartfield's answer was (R. 44): "It is." Later on he said (R. 45): "I could swear it is my signature."

As to Mrs. Bartfield's signature, Mr. Bartfield testified (R. 44): "It looks like her signature." And Mrs. Bartfield testified (R. 48): "It looks very much like my signature and I think perhaps it is." Although Mr. Bartfield testified (R. 45) that he didn't remember signing the document or petitioner asking him to and Mrs. Bartfield testified (R. 49) that petitioner did not ask her to sign a power of attorney, the authenticity of the signatures was never questioned. Aside from the positive state of the record, if there were any question about the signatures, one can be sure that handwriting expert testimony would not be absent from this record.

of attorney to the Bartfields under the guise of another document, or in blank, or that the signatures were forgeries, or that (Br. 14) he added the word "endorse"[5] after the signatures were on, is simply an exercise in fantasy. This is a criminal case. The Government's own witnesses testified they signed the power of attorney. Inference and conjecture cannot supply proof to the contrary (cf. *Nishikawa* v. *Dulles*, 356 U.S. 129).

As to the Government's final argument on the question of the sufficiency of the evidence (R. 15), it may be that the Bartfields did not see the checks until shown them by Government agents (R. 43), but there is no evidence in the record that there was any concealment by petitioner or that the Bartfields did not get whatever they were entitled to.

II.

No Forgery Was Committed Here.

A.

The endorsements did disclose an agency or representative relationship on their face. (Reply to Respondent's Point II, A, pp. 16-20.)

Without the actual exhibits (31 and 32) to look at, it cannot with assurance be said that the endorsements did not have the word "by". Clear it is that the case was tried on the theory, and all parties, including the trial judge,[6]

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[5] In the light of the broad language of the document, an irrelevant addition.

[6] Respondent's suggestion (Br. 19, f.n. 15) that the trial judge in referring to the "by" endorsement (R. 63, 64) was referring to other counts involving checks which did have "by" on them is unsupported. The fact that some of the checks did contain "by" would lead to a comment somewhere that the checks in Counts

were of the view that the endorsement did contain the word (see f.n. 4, p. 5, pet. open. br.). The case should be so viewed here, particularly since in the re-trial on the other counts (R. 126), the same legal issue will be present.

But even without the "by" present, the endorsements show on their face an agency or representative capacity. The addition of the word "trustee", regardless of its technical legal meaning, shows that the signer is signing for someone else. This, coupled with the fact that the payees on the face of the check were "c/o R Milo Gilbert" makes that conclusion inescapable. And, with due deference to respondent's contrary statement (Br. 16) we assert that the mere observation of the signatures on the back of the check shows that they clearly were written by the same hand and person. (Cf. *United States* v. *Stradley*, 295 F. 2d 33, 35 (C.A. 4 1961).)

B.

There was no forgery within 18 U.S.C. 495.
(Reply to Respondent's Point II, B, pp. 20-29.)

It is not so much the showing of agency or representation that makes the endorsements here not forgery. It is the fact that there was no palming off, no pretense that the act is that of another. As quoted in *Fitzgibbons Boiler Co.* v. *Employers Liability Assurance Corporation*, 105 F. 2d 893, 895 (C.C.A. 2 1939) from Judge Lehman's opinion in *International Union Bank* v. *National Surety Co.*, 245 N.Y. 368, 372: "'The test of forgery is whether a person has falsely and with purpose to defraud made a writing which purports to be the act of another.'" Where, as here, the no-palming off is clear from the face, there can be no forgery.

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21 and 22, the foundation for the institution by the Government of the case altogether (R. 108), did not. No such comment appears.

The fact that 18 U.S.C. 495 as originally enacted and even now deals with fraud does not help in solving the problem of what constitutes forgery when a man is charged with that crime.[7] Nor is respondent's outline of the legislative history (Br. 22-23) entirely accurate. The second section of the original statute (3 Stat. 771, 772) punishing possession has not been eliminated from the law. It became § 5422 of the Revised Statutes (42 Cong. Rec. 730; 35 Stat. 1094), then 18 U.S.C. (1940 ed.) 74 and it is now 18 U.S.C. 1002.[8]

The argument of the Government that because the original statute had a proviso (3 Stat. 772) not depriving the states of jurisdiction over their crimes as an argument that under 18 U.S.C. 495, forgery is not forgery, proves too much. That proviso is in the law today as to *all* the crimes in 18 U.S.C.[9]

It does not follow (Govt. Br. 23) that because Congress enacted a statute having to do with fraud of the Government,[10] one of the prohibited acts being forgery, that Congress intended a broad construction. Rather does it follow that when Congress enacted a criminal statute, it intended to say what it meant and mean what it said (*United States*

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[7] Chapter 47 of the present 18 U.S.C. (18 U.S.C. 1001-1026) deals entirely with "Fraud and False Statements". That fact could hardly be used as an argument that something which is not forgery, is.

[8] The Congressional debate referred to in respondent's f.n. 20, p. 22, had to do with another section of the revision which combined §§ 5418 and 5479 of the Rev. Statutes. The Revised Statute forerunner to 18 U.S.C. 495, the statute involved in the case here, was § 5421. That section was not changed in the 1909 codification save with reference to minimum penalty (42 Cong. Rec. 730).

[9] Today it is at 18 U.S.C. 3231. After 3 Stat. 772, it became Rev. St. 5328, then 18 U.S.C. (1940 ed.) 547.

[10] Incidentally, the record in this case, as pointed out above, is such that it cannot be said that anyone was defrauded here.

v. *Henning*, 344 U.S. 66, 75), and that the usual rules of strict construction of a criminal statute should apply.

Respondent is in error as to its understanding (Br. 24) of the common law meaning of forgery. In the first place, there was no alteration of a writing here. Secondly, the Government's description of common law forgery as "comprehending any alteration of a writing, for fraudulent purposes, that gives an appearance of truth to a falsity", begs the question. Since what we are talking about is an endorsement which shows on its face who did the signing, it is not, by its very nature, "a falsity". It states, precisely as the cases have held, the very thing that occurred.

But pass that. The very reference in East relied upon by respondent (Br. 24) recognizes (3 East, Pleas of the Crown 852 [1823]) that "Lord Coke indeed seems to confine (forgery) in strictness to an *act done in the name of another*" (italics added).[11]

Respondent's citation (Br. 24) of *United States* v. *Osgood*, 27 Fed. Cas. No. 15,971a, p. 663 (C.C. S.D. N.Y.) is inapposite here. What the court was talking about was that to be forgery, it is not necessary that the entire affidavit presented in that case for a pension be false; that since, in order to be a proper application, the affidavit had to have a proper jurat and since the recorder's name to that jurat was forged, that was sufficient to be forgery. This, of course, is what forgery traditionally is.

United States v. *Staats*, 8 How. 41 (1850) despite respondent's unhappiness with it (Br. 25, f.n. 21), demonstrates

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[11] And in discussing various cases, even East (*ibid.*, p. 965) calls attention to the case of *Parkes and Brown*, 2 Leach 898, S.C., which defined forgery as ". . . 'the false making a note or other instrument with intent to defraud:' which might be done either by using the name of one who did not exist or of one who did exist, without his consent . . ."

that this Court early agreed with the traditional meaning of forgery under that portion of 18 U.S.C. 495 at issue here.

The case of *Regina* v. *White*, 2 Car. & K. 404 (1847), rather than, as suggested by respondent (Br. 26) being a writing of a restrictive qualification into the definition of forgery, was simply the recognition of what forgery was and is (see Pet. Br. 10). The enactment of legislation by the British Parliament (Govt. Br. 26) emphasizes the point. Here, too, if Congress wants to punish the writing or using of another's name without authority, it knows how and may certainly do so. Indeed it already has (18 U.S.C. 1001) and the Government, in the very indictment in this case (R. 9-10; Counts 18-20) has brought counts under such a statute. But that is scarcely an argument for saying that when Congress said "forgery", it meant something else.[12]

Respondent recognizes (Br. 26) that it is advancing a minority view of the law in this country and suggests (Br. 28) that *Selvidge* v. *United States*, 290 F. 2d 894 (C.A. 10 1961) and all the other cases cited in Petitioner's Opening Brief were wrongly decided. We disagree. There is no reason why the statute at bar should be construed any differently than any other criminal statute; the rule of strict construction should apply.

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[12] Of course, if Congress wanted or wants to define "forgery", it can do so, and it may define it as it likes (within applicable constitutional limits, of course), but until it states to the contrary, forgery means forgery. As said in *Martyn* v. *U. S.*, 176 F. 2d 609, 610 (C.C.A. 8 1949), a case involving Section 3 of the National Stolen Property Act, 18 U.S.C. 415, regarding transportation of forged securities: "It is possible, of course, that Congress, when it enacted the statute in suit, may have intended or supposed that the statute would cover the transportation of such checks, but, if so, the language used did not adequately express that intent. It is elementary that a criminal statute must be strictly construed."

C.

The endorsement was not by a fictitious person.
(Reply to Respondent's Point II, C, pp. 29-30.)

If the word "by" was in the endorsements, this part of the Government's argument must fall of its own weight as we have discussed under Point II, B, supra.

But in any event, the effort to equate the addition of the word "trustee" to petitioner's own name to those cases where a fictitious, non-existent person's name is written is, we submit, impermissible. The question goes back to: what is forgery? In the non-existent person cases, there is a palming off, a stating that something was done by someone when it is not done by him at all. That is not the case here. Indeed it is just the opposite. The addition of that word shows (what is apparent from the writing itself anyway) that R. Milo Gilbert, no matter what his capacity, and not the Bartfields, is doing the writing. This reinforces petitioner's argument that there can here, therefore, be no forgery.[13]

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[13] The matter is explained in *United States* v. *Greever*, 116 F. Supp. 755, 756 (D.C. D.C. 1953) in harmonizing *Milton* v. *United States*, 110 F. 2d 556 (C.A. D.C. 1940), one of the cases cited by respondent (Br. 29). In that case the defendant signed checks in the name people knew him, though not his real name and though he had no account in the bank.

> "The decisions can only be harmonized on the rationale, adopted in the English case of Reg. v. Martin (1879), 14 Cox, Cr. Cas. 375, 5 Q.B. Div. 34, that though there may be fraud and false pretenses, there has been no forgery where the payee in accepting the check has relied upon and given credit to the person who has signed and presented the check, and not the signature itself. It is only in a case where reliance is placed on the signature as creating a valid obligation, not on the person who presents the check, that forgery has been committed.
>
> "While on the facts submitted to the Court it appears defendant is guilty of a crime, it is necessary that the Court

Conclusion

The convictions should be reversed and the counts ordered dismissed.

Respectfully submitted,

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assure him the right to answer a correct charge of crime. On the state of the law as set forth by the decided cases, the Court must decide that the proper charge against defendant is false pretenses and not transportation of a forged check in interstate commerce, and accordingly a judgment of acquittal must be granted."